

# CONSTITUTIONAL LAWS OF THE BRITISH EMPIRE

BY

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## PREFACE.

It is commonly said that if one wants to learn a great deal about a subject in a short space of time the quickest way to set about it is to prepare a series of lectures or write a book.

A few years ago I had occasion to prepare a series of lectures for students taking "Constitutional Laws of the British Empire" as their optional subject for the final LL.B. examination of the University of London. The present volume is compiled largely from the rough notes made for those lectures, and as far as possible I have adhered to the order and outline of the subject as printed in the University of London Syllabus. In preparing my lectures I found that while the textbooks there recommended covered the greater part of the syllabus and the questions set, they included a great deal which was superfluous and out of date and none of them dealt with the important constitutional developments that have taken place in the colonies since the War. I came to the conclusion that there was undoubtedly room for a textbook to meet the needs both of students taking the final LL.B. and also of students who need to study colonial government as part of Constitutional Law in the first portion of their Bar examinations. Although the book is primarily intended for such students, I am persuaded that many genuine readers will find it interesting as a short introduction to the subject and not condemn it to oblivion because it is written on the lines of a student's textbook.

not engaged in law and have no access to a set of Law Reports I have mentioned the facts in leading cases instead of merely giving legal references, and I have purposely set out the facts in colonial cases in more detail than their importance frequently deserves for the very good reason that few law students have access to a set of colonial reports and few of those who have can find time to look up cases for themselves.

In places I have departed slightly from the rule of adhering strictly to law and facts and have explained the reasons for various constitutional changes which have taken place. I have done so because I find that students more quickly remember changes in law if they understand their causes. I have, however, eliminated all controversies of a purely political nature and all forecasting of future changes which seem to me to be entirely outside the ambit of the subject.

Prior to writing the book, I read through every paper that had been previously set at the Constitutional Laws of the British Empire LL.B. final examinations of the University of London, and as far as possible, I have included in the book sufficient material to enable a student to give a passable answer to every question that has been set in the past few years or is likely to be set in the near future. This has meant adding to the book a good deal of additional matter which if I were writing the book entirely for my own pleasure and profit I would not have included.

L. LE M. M.

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# CONSTITUTIONAL LAWS OF THE BRITISH EMPIRE.

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## CHAPTER I.

### CLASSIFICATION OF COLONIES ACCORDING TO THEIR DEGREE OF AUTONOMY—THE LEGAL DISTINCTION BETWEEN MANDATED TERRITORIES, PROTECTORATES, CROWN COLONIES AND SELF-GOVERNING DOMINIONS—THE ADMINISTRATION OF THE MANDATED TERRITORIES BY ENGLAND AND HER SELF-GOVERNING DOMINIONS.

As is later explained in Chap. II (see p. 25), colonies may for some purposes, as for example in comparing differences in their common laws, be conveniently divided into two categories—conquered and ceded colonies, and settled colonies. For other purposes, as for example in considering their relations with the Colonial Office, it is more convenient to classify colonies according to their colonial constitutional status and the degree of autonomy to which they have so far succeeded. Such is not a hard-and-fast division, because with the extension of responsible government the number of self-governing colonies and dominions is being constantly enlarged, but, generally speaking, they resolve themselves into four main groups.

#### Classification of colonies according to their degree of autonomy.

Generally speaking, colonies, having regard to the present degree of self-government which they enjoy, may be classed as follows :—

1.—The present self-governing dominions, New Zealand, Newfoundland, Canada, Australia, South Africa and the Irish Free State.

Problems affecting the constitutions and governments of the self-governing dominions are referred to specially in Chaps. V, VII, VIII and IX.

2.—Colonies which possess responsible government subject to a reservation of certain matters for the legislation of the Imperial Government. These constitute self-governing colonies of a new class, of which Malta and Southern Rhodesia are at present the only examples. The constitutions of these two colonies are described in Chap. X.

3.—British India. India has racial and religious difficulties which interfere with the extension of responsible government, and accordingly her position as part of the British Empire and her constitution are unique. The constitution of India is described in Chap. XI.

4.—The Crown colonies. These are usually defined as “colonies not possessing responsible government, and in which the administration is carried out by public officers under control of the Secretary of State for the Colonies.” The classes of Crown colonies and the characteristics of government in the Crown colonies are described in Chap. XII.

**The legal distinction between Mandated Territories, Protectorates, Crown Colonies, and Self-governing Dominions.**

**A Colony.**—A colony is defined in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18, sub-s. 3, as : “ Any part of Her Majesty’s Dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.”

By an Order in Council of March, 1923, made in virtue of the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, c. 2, sess. 2), the term colony is applied to Southern Ireland. Prior to this a great deal of legislation had been passed which referred to the United Kingdom and Ireland. As Ireland has now obtained the status of a dominion, it is doubtful how far this previous legislation still has effect in Ireland, and a state of confusion still exists.

**British Dominions** (a).—The term “British dominion” essentially means a country which is not only under British jurisdiction, but is also British territory, made so by settlement or by conquest.

Dicey, *Conflict of Laws*, (4th ed.), p. lix, defines the term thus: “‘British dominions’ means all countries subject to the Crown, including the United Kingdom, and the territorial waters adjacent thereto.”

As popularly understood, “Dominions” mean Australia, Canada, South Africa, New Zealand, Newfoundland, and the Irish Free State. The term “Dominions” does not include either protected or mandated territories, or British India, or native India, because none of these are British territories, nor does it include Northern Ireland (b), which remains part of the United Kingdom.

Their relationship is described in the words of the Imperial Conference, 1926: “They are autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.”

**Dependencies.**—“Dependencies” is a term which is nowhere legally defined, but popularly used to distinguish countries or territories which, while they are under British jurisdiction, do not form part of the British dominions. Halsbury’s *Laws of England*, vol. x, p. 503, defines the term thus: “The expression ‘dependencies’ is used to signify places which have not been formally annexed to the British dominions, and are therefore, strictly

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(a) The term “Dominion” was chosen in order not to irritate republican feeling in the U.S.A. as the designation in 1867 of Canada instead of the term “Kingdom” which Sir John Macdonald would have preferred. The choice of the word “Commonwealth” as applied to Australia met with considerable opposition on account of its republican association with the government of Cromwell but was finally adopted as most fitting for the federal form of government embodied in the Australian constitution.

(b) The position of Northern Ireland is peculiar if not unique. It has a legislature and cabinet of its own, but has not control of its own customs and the powers of its legislature are limited. Unlike any of the other colonies it has retained representation in the English House of Commons.

speaking, foreign territories, but which are practically governed by Great Britain, and by her represented in any relations that may arise towards other foreign countries." Most of them are "protectorates," that is, territories placed under the protection of the British Sovereign, generally by treaty with native rulers or chiefs. Dependencies now probably include "mandated" territories, which form of political jurisdiction had not been created when this paragraph was written in Halsbury.

The definition of what constitutes a colony is sometimes of practical importance. In *Re Sir S. M. Maryon-Wilson's Estate*, [1912] 1 Ch. 55, a testator made a will with power to invest money "in the stocks or securities (not payable to bearer) of the Government of India for the time being or of any British colony or dependency." The trustees of the will were willing to invest in the securities of Ontario, Quebec, Nova Scotia, British Columbia, Manitoba and Saskatchewan, if they had power to do so. The point was brought before the Court of Chancery on an originating summons whether these provinces could be regarded for the purposes of these investments as colonies or dependencies. The Court held that by becoming provinces in the Canadian federation, such provinces had lost their status and were no longer colonies. Query, whether the trustees might possibly have invested in any stocks issued by such provinces when they were colonies prior to the British North America Act, 1867.

**Protected Territories.**—Protected territories are territories which are not part of the British Dominions, but which have been brought under British jurisdiction by treaty with organised governments having authority over them, or territories which have been brought under British jurisdiction by settlement which has not proceeded sufficiently far to make them part of the British Dominions, or by agreements made with native rulers.

If persons of British nationality set out to conquer or settle a territory, as soon as the settlement or conquest is effective the territory becomes British territory independently of any intention on their part to keep it as territory apart.

Thus, in 1842, Sir James Brooke received a grant of Sarawak from the Sultan of Borneo subject to a tribute. He endeavoured

to establish himself as an independent ruler under the style of Rajah Brooke, free from British interference, and in 1851 obtained power to nominate his successor. He refused to discuss his status with a commission appointed to inquire into it, and in 1880 the British Government went as far towards recognising him as to appoint a consul. In 1888 the recognition was withdrawn and Sarawak placed under British protection.

In *Re Southern Rhodesia*, [1919] A. C. 211, it was held that if a conquest by arms is made by a British chartered company (the British South Africa Company), it rests with the advisers of the Crown to determine how far the territory shall be dealt with as territory incorporated in the British Empire. A proclamation of annexation is not essential to constitute the Crown owner of the territory as completely as any Sovereign can own the lands *publici juris*: a manifestation of the Crown's intention to that effect by Orders in Council dealing with the lands and their administration is sufficient for the purpose.

It must be noticed that the stages of economic progress of protected territories are widely different and the reasons for extending British protection to them are frequently inconsistent. There has never been any general policy with regard to the future state of protected territories. Some protectorates have reached a state of high economic and political development, and protection has been maintained over them largely because exterior political complications would have ensued if British control of their foreign relations had been withdrawn.

Until 1923, when Egypt became an independent limited monarchy, the position of Egypt was anomalous. It owed a vague suzerainty to Turkey and paid a yearly tribute to the Sublime Porte until the entry of Turkey into the War. Egypt since 1881 had, however, been under the control of Great Britain in so far as the Khedive's administration was aided by advisors appointed by the Imperial Government. Other Powers had also a status in respect of the Egyptian debt, and the rights of foreigners resident in Egypt were specially protected under the capitulations. In official documents Egypt was not referred to as a "protectorate" which in fact it was, but as "an allied and associated Power." A protectorate was formally established

on December 18, 1914. Independence of Egypt as a limited monarchy was formally recognised on February 28, 1922, by unilateral declaration subject to reservations concerning the security of the Empire and protection of minorities and the Soudan (see Cmd. 1592).

On the other hand, protectorates in the past have been declared over unexplored portions of Africa because other Powers have threatened to annex them, and their government as settled British colonies or dominions at the time would have been impracticable. The future of such native protectorates has been regarded as inevitably one of eventual annexation, as for example, the annexation of East Africa, now known as Kenya Colony, by Order in Council, July 23, 1920. The dominions of the Sultan of Zanzibar still remain a protectorate. Problems affecting each protectorate have, however, been usually dealt with separately by the Foreign Office, but while they remain protectorates, the native populations remain protected persons. Protected persons do not obtain British nationality and protected territories do not form part of the British Empire.

The status of a protected territory is described in general terms by Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, p. 165 : "In the general case of a British Protectorate although the protected country is not a British dominion; its foreign relations are under the exclusive control of the Crown, so that its government cannot hold direct communication with any other foreign Power nor a foreign Power with its government. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected."

When what has hitherto been protected territory is annexed by the British Crown, the absolute ownership of all land comprised in it is also vested in the Crown from the date of the annexation. Thus, in *Sobhuza II v. Miller and the Swaziland Corporation*, [1926] A. C. 518; 42 T. L. R. 446, Swaziland had been a protectorate under the administration of the High Commissioner of South Africa. It had been first recognised by a Convention between the British Government and the South African Republic in 1894, as an independent State administered

by and under the protection of the South African Republic over which the British Crown in turn had a vague suzerainty.

In 1889 Umbardine, King of the Swazis, had granted exclusive grazing rights for fifty years at £50 a year over land belonging to his tribe to two Europeans named Thoburn and Watkins. The concessionaires transferred their rights to the Swaziland Corporation. It was proved by evidence that under the customs of the Swazis, no absolute ownership of property in land was recognised and all property in land was owned and enjoyed by the tribe as communal property.

After the conquest of the South African Republic and its annexation by Great Britain as the Transvaal Colony (afterwards known as the Transvaal Province) an Order in Council of June, 1903, was made transferring the administration of Swaziland to the Governor of the Transvaal. This Order in Council required the Governor to respect any native laws and customs except as far as they might be incompatible with the due exercise of His Majesty's power and jurisdiction or injurious to native welfare.

A further Order in Council of December, 1906, transferred the power of the Governor to a High Commissioner.

In November, 1907, an Order in Council was issued which provided that certain native territory, including the concessions of King Umbardine, was to be in part reserved for the exclusive use of the natives, and in part might be granted by the High Commissioner as Crown lands in virtue of his powers under the Foreign Jurisdiction Act, 1890.

In 1917 the High Commissioner exercised these powers and proclaimed certain areas, including King Umbardine's concessions, Crown lands, which the High Commissioner granted to the Swaziland Corporation in freehold and not subject to the lease of fifty years as provided in the terms of the original concession of King Umbardine.

At the same time one third of the land was given to the natives for their sole and exclusive use. The Paramount Chief now claimed usufructuary rights over the lands granted by the High Commissioner to the Swaziland Corporation as freehold property, on the grounds that under the tribal customs governing

the concession in 1889, King Umbardine could not make a grant of freehold land, and consequently the natives were still entitled to these rights.

The Swaziland Court held that the original native rights and title under the first concession had been extinguished, and that the Order in Council of November, 1907, had transferred any ownership of the land to the Crown which might make a freehold grant of it.

The Privy Council upheld this decision and considered that in making the disputed grant in 1917 the High Commissioner was exercising the powers of the Crown, either under the Foreign Jurisdiction Act, 1890 (the Order in Council of 1907 was made under that Act), or in the alternative as an Act of State, because the Crown was here acting in territory which was not English.

The effect therefore of the Foreign Jurisdiction Act, 1890, is to make the jurisdiction acquired thereunder indistinguishable from that acquired by conquest, for in both cases the power of the Sovereign is absolute. The only difference is, that in the case of a colony, once the Crown grants a Constitution it cannot recall it. This rule does not apply to a protectorate. No one can question in the Courts of the protectorate whether the Crown has jurisdiction. The certificate of the Secretary of State is final. (See also *Cook v. Sprigg*, [1899] A. C. 572.)

Where, however, land is annexed over which native chiefs have usufructuary rights, such rights are not affected by cession, and if land is subsequently appropriated by a colonial Act which provides in general terms for compensation, the compensation is to be distributed among the members of the community on the basis that the chief is transferring the full ownership, except as far as it is unoccupied. (*Amodu Tijani v. Sec. Southern Nigeria*, [1921] 2 A. C. 399; *Sunmonu v. Disu Raphael*, [1927] A. C. 881.)

**Mandated Territories.**—The conception of a mandated territory was first created by the clauses in the Berlin Act, 1885, which gave Belgium a mandate over the territory known afterwards as the Belgian Congo, and the mandate given after the Berlin Conference, 1878, to Austria over the provinces of Bosnia and Herzegovina. British mandated territories have all come into

existence under the provisions of the Treaty of Versailles, 1919, and the Treaty of Lausanne, 1923. Under the terms of those treaties certain territories were placed under the jurisdiction of the British Crown to be administered under a mandate given to it by the League of Nations. The inhabitants living in such territories are not British subjects, and such territory is not British territory.

Under Article 119 of the Treaty of Versailles, 1919, Germany did not cede her colonies to England, but renounced her title to them "in favour of the Principal Allied and Associated Powers," that is, in favour of the United States of America, the British Empire, France, Italy and Japan. By the Treaty of Lausanne, 1923, Turkey renounced her title to certain territories in the same way.

The Covenant of the League of Nations, Art. 22, provides that colonies or territories surrendered or renounced are to be held and administered "as a sacred trust for civilisation" under the League of Nations, and that securities for the performance of this trust should be embodied in the Covenant. A tutelage was to be exercised over any particular territory by some one particular Power to be called a mandatory on behalf of the League, under the terms of a charter, called a mandate, setting out the terms on which the mandatory was to govern. This provides, *inter alia*, that the mandatory is to report annually to the Council of the League on the way in which it is carrying out its trust, and consent of the Council is required for any modifications of the terms of the mandate. Disputes between the mandatory and any other members of the League are to be referred to the permanent Court of International Justice.

The mandated territories are grouped into three classes according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other circumstances:—

"**CLASS A TERRITORIES.**"—These are territories formerly belonging to the Turkish Empire, that is to say, Iraq (Mesopotamia) and Palestine. Their existence as independent nations is provisionally recognised and the functions of Great Britain, whom they chose as the Mandatory Power, are confined to

“ administrative advice and assistance.” Great Britain is pledged to an “ open door ” policy in regard to other nations, and is bound not to show any preference or discrimination against the nationals of any other Great Power.

“ CLASS B TERRITORIES.”—These are territories administered under a mandate from the League of Nations, but whose future independence is not provided for. In the administration of mandated territories in this class the Mandatory Power not only gives advice and assistance, but is responsible for the internal administration. German East Africa is administered by Great Britain on these terms.

The administration of territories of this class is subject to the following restrictions :—

- (a) The mandatory is to prohibit the slave trade and see that no forced labour is permitted except for essential public works and services ; and then only for adequate remuneration.
- (b) He is to see that traffic in arms and ammunition is controlled.
- (c) He is to prohibit the supply of intoxicating liquor to the natives.
- (d) He is to prohibit the military training of natives except for internal police and local defence.
- (e) He is to see that no military or naval bases are established in the territory.
- (f) He is to ensure freedom of conscience, free exercise of all forms of worship, and allow missionaries who are nationals of any State, member of the League, to enter and reside in the territory for the purpose of prosecuting their calling.

The policy pursued in this class of mandated territory is to raise the standard of administration up to that of British practice, so far as difficulties arising out of differences in race and local conditions will permit.

“ CLASS C TERRITORIES.”—These territories are not merely administered by the mandatory, but are “ territories which can be best administered under the laws of the mandatory as integral portions of its territory.”

In this category belong :—

- (a) German South West Africa, which is administered by the Union of South Africa. (See p. 18.)
- (b) German New Guinea, which is administered by Australia.
- (c) Samoa, which is administered by New Zealand. (Mandate, December 17, 1920.)
- (d) The British Cameroons, administered as part of the Northern and Southern Provinces of the Protectorate of Nigeria. (Stat. R. & O., 1923—No. 1621.)

The constitutional position of a Mandatory Power has been made still more complicated by reason of the fact that in 1924 the Parliament of the Union of South Africa conferred a measure of home rule upon the mandated territories of what was German South West Africa, and while German South West Africa is still subject to the mandate conferred on the Union, the mandated territories under the South West Africa Constitution Act, 1924, have a measure of responsible government. (See p. 22.)

Mandated territories are of such recent origin that there is at present very little authority for defining the limits of their autonomy, or the exact status of their inhabitants.

Article 1 of the Palestine Mandate confers on Great Britain all the powers inherent in the government of a Sovereign State, except as limited by the mandate. But the limits of British sovereignty in Mesopotamia are not defined, nor are the powers of the Mandatory Power defined in regard to the administration of the territories in categories (2) and (3).

To some extent the status of the inhabitant of a mandated territory has been made clear by the decision in *R. v. Christian* (South African Law Reports, 1923, A. D. 101 (c)). The appellant, Jacobus Christian, an inhabitant of German South West Africa, a mandated territory, was convicted of high treason for acts committed while “owing allegiance as aforesaid to the government of the Union.” He appealed on the grounds that treason can be committed only against a Sovereign Power which

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(c) See Article : “International Status of Mandatory of League of Nations. High Treason against Mandatory Authority,” by E. L. Matthews, C.M.G., K.C., Journal of Society of Comparative Legislation, vol. 6 (3rd Series, 1924), p. 245.

acknowledges no superior, and that the mandatory, the Government of the Union of South Africa, under Roman-Dutch law was not a Sovereign Power, because it was responsible for its administration to the League of Nations.

The Court followed *Transvaal State v. Phillips* (1896), Transvaal Official Reports, 216, and while admitting that the powers of the Union Government were limited by the mandate, distinguished between internal and external sovereignty, and held that as the internal sovereignty was in the hands of the Mandatory Power, that is to say, the Union of South Africa, the appellant was rightly convicted of treason.

Although the Mandatory Power has internal sovereignty the inhabitants, as already stated, do not become British subjects. The native inhabitants apparently have no nationality. The European settlers retain their nationality, whatever it is, but are allowed to naturalize themselves as British if they so wish. By an agreement made with the German Government through the League of Nations, German settlers in German South West Africa have been naturalized *en masse* under Act No. 30 of 1924, of the Union of South Africa. In other mandated territories individual naturalization only is contemplated. While domiciled in the mandated territories the status of alien settlers is similar to that of "protected persons" living in a protected territory. The Mandatory Power agrees in all cases that if any dispute whatsoever arises between the mandatory and another member of the League of Nations relating to the interpretation of the mandate, such dispute shall be submitted to the Permanent Court of International Justice at The Hague.

#### **The Administration of the Mandated Territories by England and Her Self-governing Dominions.**

"CLASS A TERRITORIES."—(a) Iraq (popularly known as Mesopotamia) (d).—Iraq is inhabited by numerous widely divergent tribes, the bulk of whom are of Arab race and Moslem by religion. It was formerly a portion of the Turkish Empire, but apart from the Moslem religion its ruling race had little in common

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(d) See an Article: "The Constitution of Iraq," by Nigel G. Davidson, Journal of Comparative Legislation and International Law, February, 1925.

with the Turks. When Bagdad, its capital, was occupied in 1917 by the British Army under the command of General Sir Stanley Maude, the situation was accepted both by the Arabs and minority sects of Jews and Christians, that whatever might be the future of Iraq, it should never return to a position of suzerainty under the Turkish Government in Constantinople. Although some promises had been held out to the Arabs that Iraq, on the conclusion of peace, should be set up as an independent State with a constitutional government, at the time of the Peace Treaty Conference at Versailles; owing to the strategic importance of Iraq in controlling the Suez Canal, the Persian Gulf and the land route to India, the probability of Bolshevik propaganda and the supposed existence of extensive oil-fields, Great Britain was not disposed to leave the country to take care of itself, but was content to protect her interests by accepting a mandate under Class A described in Article 22 of the Covenant of the League of Nations. The future status of such territories is there described as follows :—

“ Certain communities formerly belonging to the Turkish Empire have reached a stage of development when their existence as independent nations can be provisionally recognised, subject to rendering of administrative advice and assistance by a Mandatory, until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the election of the Mandatory. . . .

“ The degree of authority, control or administration, to be exercised by the Mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the Council.”

In 1921 a draft mandate was prepared by the Supreme Council, but was never confirmed by the Council of the League. Meanwhile Great Britain was invited to carry on the administration of the country upon the terms described in the mandate. The draft of the mandate prepared by the Supreme Council had provided that an organic law should be framed after consultation with the native authorities and consideration should be paid to the rights, interests and wishes of all the populations inhabiting

Iraq. The task of drafting a constitution was therefore by no means easy in view of the growing spirit of nationalism in Iraq, which demanded that it should be set up as an independent State free from all control, such as is described in Article 22. The draft of the first constitution was prepared in February of 1922, which established Iraq as a constitutional monarchy of which Amir Faisal was elected king. Although peace had not been signed with the Turkish Government owing to the breakdown of the negotiations at Sèvres, the independence of Iraq had become an actual fact, and whatever might have been at one time the aspirations of the Turks towards regaining their lost suzerainty, Iraq was formally detached from the Turkish Empire by the Treaty of Lausanne signed in the summer of 1924. Meanwhile, a period of stagnation in trade and drastic economy in public expenditure had promoted an agitation in England against the extension of British control in Iraq, which would inevitably mean further outlay. As a result of the agitation in the Press, and of the nationalist movement in Iraq itself, Great Britain found herself in the position that she could no longer take responsibility for the administration of the country under the terms of the mandate she had accepted under Article 22. To evade the difficulties and at the same time carry out her obligations to the League of Nations Great Britain made a treaty with the new State of Iraq, under which the State of Iraq promised, in return for the assistance and support of Great Britain in maintaining the national integrity of Iraq, that Iraq would accept such advice from the British High Commissioner as would enable Great Britain to fulfil her responsibilities to the other Powers and to the League. The treaty is to lapse at the end of four years or on the admission of Iraq as a member of the League of Nations, but in either event the former treaty may be substituted by a new voluntary agreement between Great Britain and Iraq.

Special agreements are annexed to the treaty regulating the financial and military relations between the two Powers, jurisdiction over foreigners, and the present duties of British officials in Iraq.

The treaty and agreements were discussed before a Con-

stitutional Assembly which sat at Bagdad from March until July, 1924, in which Christian and Jewish minorities were specially represented. In September, 1924, Great Britain laid before the Council of the League the treaty and agreements, and undertook by this means to fulfil the obligations she had taken on herself by the acceptance of the mandate under Article 22.

Iraq has thus become a constitutional monarchy, the sovereignty of which belongs to the people and is a trust confided by the people to King Faisal Ibn Husain and his heirs after him. The Senate is composed of not more than twenty members appointed by the King from among those who by their acts have gained the confidence and trust of the people, and those who have an honourable past in the service of the government and the country. The Chamber of Deputies is elected by male suffrage. Provision is made for the representation in it of non-Moslem minorities. The nationality of Iraquis is governed by a special law. Iraq having become an independent State, it is not necessary to examine here in detail the features of its constitution. Special provisions are, however, inserted in the organic law of the Constitution to provide for the preservation of the position of Great Britain as the Mandatory Power.

In particular, the House of Deputies is forbidden without the consent of the King to "pass any resolution or propose any amendment to a law under discussion if such resolution or amendment proposes the reduction or cancellation of an expenditure arising out of the treaties."

The law of the country is declared to be the Turkish law in force in the country up to the time of the entry of Turkey into the War, subsequent Turkish laws which have been in force in Iraq, and all unrepealed proclamations, rules and laws of the successive military and civil administrations set up since the British occupation. The King has power to declare by Royal Irâdah martial law in any district which then comes under a special form of administration in which the British forces under the command of the Air Officer in Iraq may co-operate with the Iraq police and military authorities.

In place of the special privileges enjoyed by foreigners under the capitulations, it is provided that foreigners may claim to be

judged by a Court containing a proportion of British Judges. Islam is declared to be the State religion, but toleration is granted to other religions, and the Christian and Jewish minorities have been granted "Spiritual Councils" which have a jurisdiction in matters of marriage, status, guardianship and charitable trusts similar to that exercised by the spiritual "Shara" Courts over Moslems.

Under the treaty made with Iraq in 1924 it was contemplated that the mandate should not be exercised by England for more than four years, and that it should in any event lapse by 1928, if not withdrawn before. The status of Iraq had, however, to be reconsidered as a result of the Mosul dispute with Turkey over the fixing of the Iraq boundary. The Commissioners of the League of Nations, to whom the case was first referred, reported in favour of Mosul being included in Iraq, but attached a condition to such finding that the territory was to remain under the control of the League for another twenty-five years. The Permanent Court of International Justice to which certain points were later referred decided in December, 1925, that the frontier should be laid down as in the provisional decision of October 29, 1924, but this was to become definitive only if within six months the British Government could submit to the Council of the League a new treaty with Iraq, ensuring the continuance for a period of twenty-five years of the mandatory regime defined by the treaty of alliance with Iraq, and the British Government's undertaking approved by the Council on September 27, 1924. The English Government accepted these conditions and its action was approved by the English Parliament in December, 1925.

In December, 1927, it was announced that a treaty had been made with Iraq acknowledging it to be in every way an independent State. Great Britain, however, still remains responsible to the League during the next twenty-five years for carrying out the mandatory powers intrusted to her. This, in fact, has meant the maintenance in Iraq of armed forces and aeroplanes costing over £4,000,000 a year. The upkeep of Indian troops so employed is included in the Indian budget, and as the future of Iraq is not of direct concern to India, and India has no control

of the exercise of the mandate, their presence there is open to strong constitutional objections.

(b) **Palestine.**—Palestine is similarly administered by a High Commissioner appointed by the British Crown as a “Class A” territory under a mandate dated July 24, 1922, of the Council of the League of Nations acting under Article 22 of the Covenant of the League. It is there provided:—

Art. 1. “The Mandatory shall have such powers of legislation and administration save as they may be limited by the terms of the Mandate.”

Art. 2. “The Mandatory shall be responsible for placing the country under such political administrative and economic conditions as will secure the establishment of the Jewish National Home and the development of self-governing Institutions, and also for safeguarding the civil and religious rights of the inhabitants of Palestine, irrespective of race and religion.”

An Imperial Order in Council of August 10, 1922, provided for the administration of Palestine by a High Commissioner appointed by the British Crown, who should have complete executive power, while legislative powers were to be exercised by a Legislative Council who were enabled to make ordinances for the “peace, order and good government of Palestine subject to a provision that no Ordinance should be passed which should be repugnant to the terms of the Mandate.” Owing to the opposition, largely of the Arab population, the Legislative Council never came into being, and by an Order of May 4, 1923, the legislative authority was transferred to the High Commissioner, so that he has thus been intrusted with both executive and legislative authority.

But whereas the powers of a High Commissioner in a protectorate, being exercised under the provisions of the Foreign Jurisdiction Act, 1890, are practically absolute (*R. v. Crewe*, [1910] 2 K. B. 576; 26 T. L. R. 489; see p. 63) the powers of the High Commissioner are limited by the terms of the mandate.

This limitation of the powers of the High Commissioner of Palestine is illustrated in the case of *District Governor, Jerusalem-Jaffa District v. Suleiman Murra and another*, 42 T. L. R. 299. On May 25, 1925, the High Commissioner promulgated an

Ordinance empowering the District Commissioner by Orders to authorise the Municipality of Jerusalem to take water for their reservoirs from the Urtas springs, which were communal property belonging to an Arab village in the neighbourhood. The inhabitants applied for an injunction and the Supreme Court of Palestine held the Ordinance *ultra vires*, on the ground that it conflicted with Article 2 of the mandate because it was an interference with civil rights. The Supreme Court of Palestine considered that "civil rights" included antecedent rights in property which could not be disturbed without giving adequate compensation. By an Imperial Order in Council of October 9, 1924, provision had been made for appeal from the Supreme Court of Palestine to the Privy Council at Whitehall. (This jurisdiction is specially conferred for there is no prerogative to receive appeals from mandated territories as there is in colonies.) The District Commissioner accordingly appealed. The Privy Council reversed the decision of the Supreme Court of Palestine, though they held that the Supreme Court had jurisdiction to declare any ordinance of the High Commissioner *ultra vires* if it was shown to be repugnant to the terms of the mandate.

The grounds for the decision of the Privy Council were:—

1. That protection of civil rights in the mandate does not mean that all antecedent rights of the inhabitants must be maintained (otherwise no legislation would be possible).
2. Nor does protection of civil rights essentially mean that compensation must be given if they are interfered with.
3. Protection of civil rights means that legislation must not discriminate in favour or against the right of particular classes of persons or persons belonging to different religions.

"CLASS C TERRITORIES."—(a) **German South West Africa (e).**—Although inclosing an area of 322,000 square miles, or three-quarters of the extent of the entire Union of South Africa, what was formerly German West Africa, apart from a narrow coastal

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(e) See Article in Journal of Comparative Legislation, February, 1927: "The Mandate over South West Africa," by Professor E. Emmett, and "The Grant of a Constitution to the Mandated Territory of South West Africa," by E. L. Matthews, C.M.G., K.C., November, 1926.

strip along which the Dutch settled in 1792, was never inhabited by white men until the latter half of the last century.

In 1876 the native chiefs petitioned the Government of the Cape Colony to annex their territory, but meanwhile, a number of German traders had settled in the hinterland, chief among whom was Adolph Luderitz, a merchant of Bremen, who arrived in 1882, and, largely owing to the lack of enterprise on the part of the Cape Government, Prince Bismarck was allowed to hoist the German flag at Agra Pequena on April 24, 1884. For seven years thereafter the country was administered by the Deutsche Kolonial Gesellschaft under a charter from the Imperial Government which took over its responsibilities in 1890 (f).

From 1890 until the outbreak of the War, the territory was administered by a Governor appointed by the Imperial Government, assisted by a "Landesrath" or council of thirty-four members, nineteen of whom were nominated by the German Imperial Government. The Landesrath acted in a purely advisory capacity, and had no control over revenue or expenditure which were provided for in the Imperial budget. The German Government settled the policy of the country as regards railways and guaranteed the interest on loans raised for their construction. Posts and telegraphs were kept under the control of the Imperial Government through a "Finanz Referent," and only certain kinds of licences and a local income tax were available for local improvements. The German Administration therefore did not include any measure of self-government, and, as no respect was paid to native rights, the German administration throughout its existence were forced to carry on an incessant war in putting down native rebellions.

At the outbreak of the Great War, the German colonial forces, intending to join up with the disaffected elements in the Transvaal Province, invaded the Union territory and were repulsed by the Union forces under Generals Botha and Smuts. The German forces finally surrendered in July, 1915, and the

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(f) See the Official Year Book of the Union of South Africa, No. 8, pp. 966—1015.

territory was put under a military administration, which was not finally withdrawn till January, 1921.

Meanwhile, although the Union Government had no intention of ever letting Germany regain possession of her colonial territory, it was not possible to carry out a policy of open annexation of territory in view of the ideals which the Governments of the allied nations, particularly the United States, had held out to their respective populations, that this "was a war to end war," and was not for purposes of territorial aggrandisement. The Union of South Africa thus had to be content to take over the administration of the country under a mandate coming under Class C. General Smuts, in a speech in September, 1920, correctly described this relationship : "In effect the relations between the South West Protectorate and the Union amount to annexation in all but name."

Meanwhile, to provide for the withdrawal of the military administration, and for the mandate, the terms of which were then being discussed at the Peace Conference at Versailles, the Union Government, in September, 1919, under Act 49, obtained from the Union Parliament authority to do such things as might be proper or expedient for giving effect to any mandate that might be issued with reference to South West Africa, and to issue proclamations and regulations in aid thereto. The Union Government was given complete power to alter or repeal any existing laws including proclamations issued during the military occupation, or to make new laws with a proviso that the grant of State land, minerals or trading, and the alienation of native reserves were not to be dealt with without the specific authority of Parliament. The Union Government passed such legislation by virtue of the powers contained in the South Africa Act, 1909, "to legislate for the peace, order, and good government of the Union." Although such powers were originally intended to relate only to Union territory and not to mandated territory, it was considered that the mandate itself must have by inference conferred such powers on the Union Government. The country was put under the control of an administrator, aided by a council of nine, appointed by himself, who are to be representative of farming, mining, native and other interests.

By the Administration of Justice Act, 1919, the Roman-Dutch law existing and applied in the Province of the Cape of Good Hope became the common law of the mandated territory as from January 1, 1920. All existing laws in conflict therewith were to the extent of such conflict repealed, except proclamations issued during the military occupation, and in force on that date. In addition, much of the statute law of the Union relating to such subjects as marriage, registration of deeds, companies, negotiable instruments, stamp duties, prisons, profiteering, concealment of birth, protection of women, veterinary diseases, vagrancy, police regulations, etc., have been extended.

The law therefore in force in South West Africa includes :—

- (1) Roman-Dutch law, with the modifications it has undergone in the Cape Province.
- (2) Certain Union Acts of Parliament which apply directly to the territory.
- (3) Proclamations issued by the Administrator, some of which specifically introduce Union statutes.
- (4) Those fragments of the German law which have survived by reason of the fact that they do not conflict with any laws already mentioned.

The mandate granted under Article 119 of the Treaty of Versailles comes under Class C of the mandates described in Article 22 of the Covenant of the League of Nations. The terms are the same as the mandates conferred under A and B classes, save that there is no pledge to preserve the open door policy to the trade of other countries, and a more strict control is exercised over the sale of intoxicating liquor, which in Class B applies only to "spirituous" liquor. The main difference in the character of its administration is that the Mandatory State, which is the Union of South Africa, does not confine its work to giving advice, but administers the territory as an integral part of its own territory.

The mandatory must make an annual report to the Council of the League of Nations, and give full information with regard to the territory and indicate the measures taken to carry out its obligations.

One circumstance which handicapped the Union Government

in formulating any measure of self-government for the mandated territories was that the majority of the white population were of German nationality. Accordingly, in 1924, General Smuts approached the German Government with a view to getting its approval and recommendation of a bill providing for the naturalization of the German inhabitants *en bloc*. Before General Smuts' bill was passed a general election intervened and General Hertzog, on becoming Premier, passed a new bill (Act 30 of 1924), which differed from Smuts' plan to the extent that, whereas under Smuts' bill application was necessary before naturalization was conferred, under the later Act British nationality was automatically conferred upon the German inhabitants domiciled in the territory, unless they signed a declaration within six months that they were desirous of not becoming so naturalized. When the Act came into force on March 15, 1925, out of 3,228 Germans or ex-enemy subjects, only 260 had made the declaration that they were not desirous of so becoming naturalized. Naturalization under the Act does not mean the acceptance of complete allegiance, for there is a condition in favour of persons so naturalized that they are not to be used in any military capacity against Germany within a space of thirty years.

In January, 1920, the military Courts were abolished and a superior Court entitled the High Court of South West Africa set up with its centre at Windhock, appeal from which lies to the Appellate Division of the Supreme Court of South Africa.

The official languages of the Courts are English and Dutch, but the German language may be used by litigants or their representatives in addressing the Court. For purposes of convenience the Union territory of Walvis Bay has been brought under the administration of South West Africa.

The grant of a representative form of government, provided for by section 1 of Act 49 of 1919, had been delayed, partly owing to the peculiar position of the Union as a Mandatory Power, unable to make changes inconsistent with the terms of its mandate, and partly owing to the change in the political party in power in the Union Government.

Act No. 42 of 1925 provides that Act 49 of 1919 shall remain in force in all respects, and that the Government shall retain all its powers of administration, either directly or through the Administrator whom it appoints to act on its instructions, and at the same time shall retain its full power of legislation. The Union reserves the right to make laws :—

- (1) Providing for the appropriation of moneys and to impose taxes to defray the expenses of administration.
- (2) It reserves the right to veto any laws passed by the representative assembly.
- (3) Or to disallow any Act of the representative assembly which is inconsistent with an Act of the Union Government.

The territory is to be governed in other respects by a Legislative Assembly, which is to consist of eighteen members, one-third of whom are to be nominated, subject to the approval of the Union Government, by the Administrator, from voters resident in the territory, and the other two-thirds to be elected by the adult male European inhabitants of the territory who are British subjects in the Union under its naturalization laws as applied in 1924 to the territory. The territory is divided into twelve constituencies and the total electorate numbers about 7,000. The Assembly is to meet at least once a year and is to be re-elected every three years.

Nine members form a quorum. The minutes and records are kept in English and Dutch, but any member is permitted to address the Assembly in the German language.

Section 26 of the Act reserves from the consideration of the Council certain subject-matters. This provision is intended to safeguard against the passing of legislation inconsistent with the Union's mandate, and to prevent any interference with the Union property in the railways or the rights of public officials in the service of the Union Government.

Native affairs and the taxation of natives are removed from the consideration of the Assembly. The former German laws have been superseded by proclamations providing for their settlement and employment. Under the Native Administration Proclamation, 1922, certain areas are set aside for the natives, in

addition to the areas formerly reserved by the Germans under treaties made with the native hereditary chiefs.

Other reserved subjects include railways and harbours, customs and excise, telegraphs, immigration, banking and currency.

Section 27 of the Act reserves certain subjects from the Assembly's consideration during the first three years of the Assembly's existence. These include subject-matters connected with : (1) Police; (2) Civil Administration, and (3) Education. After three years legislation on these subject-matters will come within the powers of the Assembly provided the Union Government has accepted a recommendation to that effect, passed by a two-thirds majority of the whole Assembly.

The Government of the country is vested in the Administrator aided by an executive committee of four, elected by proportional representation from among themselves, or from outside. Only European voters are eligible for election to the Council. The functions of the Committee are to carry on the administration of the territory only in respect of those matters over which the Assembly has, for the time being, powers to legislate. In matters which are not within the purview of the Executive Committee the Administrator is supreme, subject to any instructions received by him from the Union Government, but he is to be aided in making his decisions by an Advisory Council, consisting of eight members, three of whom are to be appointed by the Administrator subject to the approval of the Union Government, and four are to be the members of the Executive Committee. One of the appointed members is to be an official selected mainly for his knowledge of the wants and wishes of the native population. The other two members may or may not be members of the Legislative Council.

## CHAPTER II.

THE COMMON LAW OF THE COLONIES: EFFECT OF DISTINCTION BETWEEN (A) SETTLED AND (B) CONQUERED OR CEDED COLONIES.—INTRODUCTION OF ENGLISH STATUTE LAW INTO A SETTLED COLONY.—THE COMMON LAW AND EXISTING STATUTE LAW OF A COLONY ACQUIRED BY CONQUEST OR CESSION.

Colonies may be classified into two categories :—

- (i) Those which have been acquired by more or less peaceful settlement, *e.g.*, Australia, New Zealand, and the provinces of the Dominion of Canada formerly known as Upper Canada, and Newfoundland.
- (ii) Those which have been acquired by cession under a treaty, *e.g.*, Quebec, Cape of Good Hope, etc.

The common law obtaining in these two classes of colonies is settled on totally different principles, which are as follows :

(A) Settled Colonies.—When English colonists settle in a country which has no organised system of law of its own, they are considered to take out with them the common law at that time obtaining in England at the time when the country was effectively settled, and so much of the statute law as is applicable to their circumstances and surroundings in the new country. As regards the application of the broad principles of the common law—the right of liberty of the subject, freedom of speech, etc.—there is usually no difficulty. “ If there be a new and uninhabited country found out by English subjects, as the law is the birthright of English subjects, so wherever they go they carry their laws with them, and therefore such new found law is to be governed by the laws of England ” (*per Lord Mansfield in Catterall v. Catterall*, 1 Robert. 581).

Thus it has several times been held that although the status of slavery is recognised in a country under whose laws slavery is permitted, if a slave escapes from such a country and takes refuge in a British settlement or on board a British ship he is immediately a free man and his former owner has no right to

reclaim him. Thus, in *Forbes v. Cochrane* (1824), 2 B. & C. 448, John Forbes had a plantation in Spanish East Florida, a country wherein slavery was legally recognised and he there employed slaves. In 1815, after the close of the war with the United States of America, Vice-Admiral Sir Alexander Inglis Cochrane, as Commander-in-Chief of the British Navy, was stationed off a North American station for the purpose of taking aboard those who had sympathised with the British and to escape American persecution might prefer to take service with the British army or navy, or be settled in British North America or the West Indies. The plaintiff's slaves, without any inducement from the Commander-in-Chief of the British squadron, deserted the plaintiff's plantation and came aboard several of the men-of-war with other refugees. Sir Alexander Cochrane refused to give them up and ordered them to be sent to a place of security until their destination had been decided upon by the British Government. The Court, nine years later, held that Sir Alexander Cochrane was under no liability for refusing to give them up. *Per Holroyd, J.* : "If a slave puts foot in this country his slavery is at an end. Put the case of an uninhabited island discovered and colonised by the subjects of this country; the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, but in the case of the newly discovered country freedom would be as much the inheritance of the inhabitants and their children, as if they were treading the soil of England" : the moment the slaves got aboard the British ships, their slavery was at an end, and any right which the plaintiff had under Spanish laws over them ceased.

A difficulty does, however, arise when it is sought to apply to a settled colony a principle which is generally recognised as having become contrary to popular notions of justice, and yet which is part of the common law of England. For instance, it has always been the common law in England that a municipality cannot be sued for damage arising out of the non-feasance of its duties, though it undoubtedly can be made liable for acts of misfeasance. In England, as early as 1788, it was decided in *Russell v. The Men dwelling in the County of Devon* (1788),

2 T. R. 667; R. R. 585, that an action on the case could not be maintained against the men dwelling in the county of Devon to recover satisfaction for an injury done to the wagon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants for themselves and the rest of the men dwelling in that county appeared and demurred generally (see Article in Law Journal, July 2, 1927, on this case, p. 7). Since the growth of municipal activities it has been commonly considered to be productive of a great deal of hardship. In 1879 the Government of Nova Scotia passed the County Incorporations Act, which recognised the liability of a municipality in the colony to be sued for acts of misfeasance but granted no special right of action for acts of non-feasance.

In *Municipality of Pictou v. Geldert*, [1898] A. C. 524, the respondent sued the municipality for damages arising out of the non-repair of a bridge. The Privy Council decided that as the County Incorporations Act, 1879, did not cover non-feasance, the respondent was thrust upon his remedies at common law, and as the common law of Nova Scotia, a settled colony, must be the same as England, he had no remedy.

Still more difficult is the problem of deciding how much of the statute law of England is taken to the settled colony by the settlers. The difficulty arises, first, because it may afterwards be difficult to say at what exact time the colony was effectively settled so as to become a settled colony under British jurisdiction, and, secondly, what laws may be regarded as applicable to the new colony at the time when it was settled. This point is amply illustrated by the circumstances in connection with the *Lauderdale Peerage Case* (1885), 10 A. C. 692. In that case Major Frederick Henry Maitland laid claim to the peerage vacated by the death of Charles, twelfth Earl of Lauderdale. He claimed descent from Colonel Richard Maitland, fourth son of Charles, sixth Earl of Lauderdale, who was born in 1724, and whose domicil of origin was Scottish. Colonel Richard Maitland had embarked in 1757 with his regiment for what were then the New England colonies of America.\* He remained there a number of years and two days before his death in 1772 was married to

Mary McAdam, a woman who had had three children by him, and had a fourth child by him after his death. As Colonel Maitland had never given up the intention of returning to Europe, and had thus retained his Scottish domicile of origin, the four children, under Scots law, became legitimatized by the subsequent marriage, if it were valid, and the claimant traced his claim through one of them. It was argued against the validity of the marriage, *inter alia*, that by a local law of the Province of New York, passed in 1674, the publication of banns or a licence was made an indispensable preliminary to a lawful marriage, and this continued to be the law in 1772, the year of the disputed marriage. Colonel Maitland having been married by a clergyman according to the rites of the Church of England, but without banns, it was argued that the marriage of Colonel Maitland was invalid. The Court, a committee of the House of Lords appointed to inquire into the claim (*per* Lord Blackburn) held that the Colony of New York had *prima facie* the marriage law of England such as it was from the time of the accession of Charles II, or, perhaps, until the English Revolution, 1688. Marriage in England at that time, solemnised according to the form of the Church of England and by a clergyman of the Church of England, was valid, although it were a clandestine or irregular marriage, and there might have been no banns or licence. A clergyman who performed such a marriage might be liable for censure from his ecclesiastical superior, but such a marriage was not invalid. The validity of the marriage turned upon whether the law of marriage had been modified previously to 1772 by legislation in England, which had in consequence become law in the Colony of New York. In 1684 a patent was given from the Crown to James, Duke of York, who promulgated certain laws for the government of the colony, but it was doubtful how far these laws were ever put in force. It seemed, however, that under these laws, known as the Duke's laws, a marriage in New York, performed under the conditions described, would have been valid in England, and therefore was valid in New York. A minister who celebrated such a marriage without a licence from a bishop would, in England, have been subject to penalties, but as in the circumstances it was impossible to get

a licence from the bishop for this marriage, the licence obtained from the governor no doubt was sufficient, and the claimant had made good his claim to the peerage.

Another good illustration of a statute in force in England before the settlement of a colony, but which did not become part of its common law after its settlement because it was framed to meet circumstances peculiar to England and not applicable to the colony, is found in *Mayor and Citizens of Canterbury v. Wyburn and the Melbourne Hospital*, [1895] A. C. 89. In that case, J. G. Beaney, an inhabitant of Melbourne and domiciled in Victoria, died June 13, 1891, having by codicil to his will bequeathed a legacy to the appellants of £10,000 for the purpose of buying a suitable piece of ground at Canterbury in Kent, and erecting thereon with as little delay as possible a free library and reading-room for the working classes, such building to be called "The Beaney Institute for the Education of Working Men." His residuary legatees were certain charitable institutions in Melbourne, and Melbourne Hospital as one of them was selected to defend the interests of all. It was contended that the £10,000 bequeathed to the appellants must fail by reason of English statute law which restricts gifts to charitable uses. The statute referred to was the Act of 9 Geo. 2, c. 86, passed in the year 1736, long before the effective settlement of Australia. It is entitled "An Act to restrain the disposition of lands, whereby the same become unalienable," and after referring in the preamble to the older statutes passed to restrain the mischiefs of gifts in mortmain, proceeds: "Nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof be it enacted . . . etc." The Privy Council held that the gift was governed wholly by the law of Victoria, although the ground to be bought was at Canterbury in Kent, and that, affirming *Att.-Gen. v. Stewart*, 2 Mer. 143, the Act of 1736 had never applied to the colonies, but that the mischief struck at by the Act and the methods prescribed for lawful gifts were of a local character peculiar to

England. The Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), which consolidated the Mortmain Acts in England did not apply to Victoria, and the gift being valid under the law of Victoria, the executors must pay the legacy to the corporation.

On the other hand, in *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381, the Privy Council held that the common law of England governing perpetuities, apart from any statutes passed in England, had become part of the common law of Penang (Straits Settlements). In that case a Chinese woman, living in Penang, made a devise of "two plantations in which the graves of the family are placed, to be reserved as the family burying place, and not to be mortgaged or sold," and a direction that "a house for performing religious ceremonies to my late husband and myself be erected." The Privy Council held that having regard to the Royal Charters of 1807, 1826, and 1855, granting the East India Co. the administration of the island, the law of England must be taken to be the law of Penang, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. Such a gift being void as a perpetuity under English law, apart from statutes which might not apply to Penang, there being no evidence that such a gift was to the advantage of the public in Penang, it was void also in Penang.

**Exceptions to the rule that colonists take to a settled colony the common law of England applicable to it.**—To the rule that the colonists take to the colony the common law of England and so much of the statute law of England in force at the time which is applicable to the colony, there are two important exceptions. The law relating to the Established Church of England does not apply to the settled colonies because there is no Church of England established there. The legislature of a colony may found an established church which is declared to be part of the Church of England, and obedience to its rules and discipline may be enforced by resort to the civil Courts of the colony. But a mere declaration of persons belonging to a church in a colony that they are in communion with the Church of England does not make its members amenable to the Courts of the Church in England;

or enable the colonial church to establish Courts for temporal as well as spiritual matters. This rule was upheld in the case of *Re John William Colenso, Lord Bishop of Natal* (1864), 3 Moo. P. C. 115 (a). The facts there were that the Queen, in the exercise of her authority as Sovereign created by letters patent a Metropolitan and two Suffragan Bishops with episcopal jurisdiction and authority in the Colony of Good Hope, which colony had at the time a Legislative Council and House of Assembly. By letters patent the Suffragan Bishops were declared subject and subordinate to the Metropolitan in the same manner as a Bishop of any See within the Province of Canterbury was under the authority of the Archbishop thereof, the Colonial Metropolitan Bishop being subject to the general superintendence and revision of the Archbishop with an ultimate appeal from any sentence pronounced by such Metropolitan to the Archbishop or his successors, who should finally decide and determine the same. These letters patent were not made in pursuance of any Order in Council, or of any statute of the Imperial Parliament, nor were they confirmed by an Act of the Legislature of the Cape of Good Hope, or of the Legislature of the Council of Natal.

Under these letters patent the Suffragan Bishop of Natal was consecrated and took the oath of canonical obedience to his Metropolitan. In the year 1863 certain charges of heresy and false doctrine having been preferred against the Bishop of Natal, before his Metropolitan, that Bishop sentenced the Bishop of Natal to be deposed from his office and to be prohibited from the exercise of any divine office within any part of the Metropolitan Province of the Colony. Upon appeal to Her Majesty in Council, it was held : First, that, as there was an independent Legislative Assembly in the Colony there was no power in the Crown by virtue of its prerogative (without the provisions of a statute of the Imperial Parliament) to establish a Metropolitan See or Province, or create an Ecclesiastical Corporation whose status, right and authority the colony could be required to recognise. Secondly, that, even if the letters patent did create

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<sup>(a)</sup> See also *Merriman v. Williams* (1882), 7 A. C. 484 (P. C.); *Natal (Bishop) v. Gladstone* (1866), L. R. 3 Eq. 1.

between the Metropolitan and the Suffragan Bishop an ecclesiastical status, yet the Crown had no power to confer any jurisdiction or coercive legal authority upon the Metropolitan over a Suffragan Bishop or over any other person. Thirdly, that an oath of canonical obedience taken by the Bishop to his Metropolitan did not confer any jurisdiction on the Metropolitan Bishop, by which a sentence of deprivation could be supported, nor was it legally competent to the parties to give or receive such voluntary or consensual jurisdiction; and, lastly, that the proposed ultimate appellate jurisdiction given to the Archbishop of Canterbury was equally invalid.

It is the undoubted prerogative of the Crown to receive appeals in all colonial causes, and by the 25 Hen. 8, c. 9 (by which the mode of appeal to the Crown in ecclesiastical cases is directed) it is by section 4 enacted that, "for lack of justice at or in any of the dominions, it shall be lawful to the parties so grieved to appeal to the King's Majesty in the King's Court of Chancery," an enactment which gave rise to the Commission of Delegates, which was abolished by the 2 & 3 Will. 4, c. 92, and for which the Judicial Committee of the Privy Council is by the 3 & 4 Will. 4, c. 41, now substituted.

In a dispute in one of Her Majesty's colonies between two independent Prelates which, previous to the 25 Hen. 8, c. 29, would have been referred to the Pope, Her Majesty has appellate jurisdiction, and can exercise the same referring the matter under the 3 & 4 Will. 4, c. 41, for the advice of the Judicial Committee of the Privy Council.

*Semblé.*—Though the Crown may by its prerogative establish Courts to proceed according to the common law, yet it cannot create any new Court to administer any other law.

As no ecclesiastical tribunal or jurisdiction is required in a colony or settlement where there is no established church, the ecclesiastical law of England cannot be treated as part of the law which settlers carry there from the mother country.

The Constitutions of most of the self-governing Dominions provide for liberty of conscience and the non-recognition of any established religion, and since the Colenso controversy the Government has discontinued its practice of issuing letters

patent to Bishops in colonies possessing an independent Legislature.

The other apparent exception to the rule, that in a settled colony the common law prevailing is the common law of England at the date of its effective settlement, is that, although the House of Commons has by custom privileges which it has claimed from time immemorial, and which are part of the common law in the sense that everyone is subject to them if a Legislature is set up in a settled colony, it will not acquire the same privileges as the English House of Commons as part of the common law brought into the colony by the settlers. Thus, in the case of *Kielley v. Carson, Kent and Others* (1842), 4 Moo. P. C. 63, Kielley was a surgeon and manager of the hospital of St. John's town, the capital of Newfoundland. Kent was a member of the House of Assembly of Newfoundland. In his place in the House he had made malimadversions on the management of the hospital; Kielley, on meeting Kent in the street, had threatened him, saying : "Your privilege shall not protect you." The complaint of Kent was referred to a Committee of Privileges of the House of Assembly of Newfoundland, who ordered the Speaker, Carson, to issue his warrant to the Sergeant-at-Arms to bring the appellant Kielley to the Bar of the House. He was brought to the Bar and Carson, the Speaker, read to him the report of the Committee and declared his conduct to Kent a breach of privilege. Kielley made use of violent language about Kent, and the House directed that Kielley should remain in the custody of the Sergeant-at-Arms. Kielley refused to make any apology and was committed to gaol. He then brought this action for trespass and false imprisonment. The Supreme Court of Newfoundland held his demurrers to be sufficient in law. The Privy Council held that the House of Assembly of the Island of Newfoundland does not possess as a legal incident the power of arrest, with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local Legislature. *Semble* : The House of Commons possess this power only by virtue of ancient usage and prescription : the *lex et consuetudo parlamenti*. *Semble* : The Crown by its

prerogative can create a Legislative Assembly in a settled colony, subordinate to Parliament, but with supreme power within the limits of the colony for the government of its inhabitants, but, *quare* whether it can bestow upon it an authority, *viz.*, that of committing for contempt, not incidental to it by law.

In a very similar case, *Fenton and Fraser v. Hampton* (1857), 11 Moo. P. C. 347, *Kielley v. Carson* was reviewed and upheld. In *Fenton and Fraser v. Hampton* the respondent, John Hampton, was Comptroller-General of Convicts in the Island of Van Diemen's Land. A committee was appointed by the Legislative Council to inquire into the abuse of the convict system, and Hampton was ordered to appear before the committee and give evidence. He refused and was ordered to appear before the Bar of the Council. He refused to appear, and by a resolution of the Council was found guilty of contempt and was arrested on the warrant of the Speaker, Michael Fenton, and kept in gaol until the Council was prorogued by the Governor. It was held on appeal to the Privy Council that the *lex et consuetudo parliamenti* applies exclusively to the House of Commons in England, and is not conferred upon a supreme Legislative Assembly of a colony or settlement by the introduction of the common law of England into the colony. No distinction in this respect exists between colonial legislative councils and assemblies whose power is derived by grant from the Crown or created under the authority of an Act of the Imperial Parliament.

At one time it was thought that the two decisions quoted above, *Kielley v. Carson* and *Fenton v. Hampton*, forbade the usurpation of a privilege to commit for contempt persons not members of a House, but that a colonial assembly, apart from statute, might have a privilege to control its own members by committing them for contempt upon a Speaker's warrant. This contention was disposed of by the decision of the Privy Council in *Doyle v. Falconer* (1866), 1 P. C. 328. There, the Legislative Assembly of the Colony of Dominica ordered George William Falconer, a member of the Lower House, to be taken into custody by the Sergeant-at-Arms upon the warrant of the Speaker, Thomas William Doyle, because, among other acts complained of, he had said of the Speaker, while the Speaker

was in the due execution of his office, " You are a disgrace to this House." It was held that the Legislative Assembly of Dominica did not possess power to punish a contempt, though committed in its presence and by one of its members; such authority does not belong to a Colonial House of Assembly by analogy to the *lex et consuetudo parlamenti*, which is inherent in the two Houses of Parliament in the United Kingdom, or by a Court of Justice, which is a Court of record : a Colonial House of Assembly having no judicial functions. In *Barton v. Taylor* (1886), 11 A. C. 197, it was further held that the Legislative Assembly of New South Wales has " only such powers as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute," and do not extend to justify punitive, or unconditional suspension of a member during the pleasure of the Assembly.

A colonial legislature may, however, by statute confer on its members special privileges. In which case the privileges must be construed according to the statute and not as forming part of the common law of the colony. Thus, in *Fielding and others v. Thomas*, [1896] A. C. 600, the facts were that Thomas, the respondent, was mayor of the municipality of Truro in the Province of Nova Scotia. Lawrence, one of the appellants, was recorder of Truro, and also a member of the House of Assembly of Nova Scotia. The House of Assembly had passed an Act which raised the salary of Lawrence as recorder. A petition was got up by the town council of Truro which was signed by Thomas as mayor, making various charges of corruption against Lawrence, and misbehaviour in his office of recorder. The Legislative Assembly voted this a breach of the privileges of its members, and that Thomas should be called to the Bar of the House. He refused to obey and was arrested by the Sergeant-at-Arms, and committed to the common gaol at Halifax for forty-eight hours. He applied for a writ of *habeas corpus*, which was issued out of the Supreme Court, and he was released. He then brought this action for false imprisonment against the appellants, all of whom were present at and voted for the passing of the resolution which led to his imprisonment. The defence relied upon was that, under the local Revised

Statutes (5th Series, c. 3, ss. 20, 29, 30 and 31), the House of Assembly had enacted that the members of the House of Assembly should have "like privileges and immunities and powers as shall for the time being be held, enjoyed and exercised by the House of Commons of Canada," and the Dominion Parliament, by 49 Vict. c. 11 (British North America Act, 1867), has conferred on its members the privileges, immunities and powers of the House of Commons of the United Kingdom. By section 88 of the same Act (British North America Act, 1867), the constitution of the Legislature of Nova Scotia was to continue as it existed at the union until altered by authority of the Act. Section 92 of the British North America Act confers powers on the Provincial Legislatures to make laws (*inter alia*) affecting the privileges of their members, and consequently the statute which gave the appellants the immunity they relied upon was valid. The Privy Council, distinguishing *Barton v. Taylor* (*cit. supra*), held that this statute, Revised Statutes (5th Series, c. 3, ss. 20, 29, 30 and 31), which created the jurisdiction of the House of Assembly of Nova Scotia, and indemnified its members against legal proceedings in respect of their votes therein, was a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. The Privy Council reversed the decision of the Supreme Court and ordered the respondent to pay the costs of the appeal. (See also *Toohey v. Melville*, 13 N. S. W. L. R. 182, and *Harnett v. Crick*, [1908] A. C. 470.)

To make clear what are the privileges claimed by their legislatures for their members, colonial legislatures have frequently since, by special Acts, described them. Victoria, Western Australia and South Australia, have by special Acts of their legislatures granted to their legislative assemblies and their members powers equal to or less than those of the English House of Commons. By 63 & 64 Vict. c. 12, Const. s. 49, the privileges of the Parliament of the Commonwealth of Australia are to be such as are appointed by Parliament by legislation. Until then they are to be those which are enjoyed by the Imperial House of Commons from time to time. By section 57 of the South Africa Act, 1909, the privileges of the Parliament of the Union

are to be those of the Cape Lower House, until Parliament decides otherwise. By Act 198 of 1911 the privileges exercised by the Union Parliament must not exceed those of the Imperial House of Commons from time to time. In the Transvaal and the Orange River Colony the constitutions formerly allowed each House to take by legislation the privileges of the House of Commons from time to time, and any less privileges. The Transvaal Parliament adopted the privileges of the Imperial House of Commons by the Parliamentary Privileges Act, 1907. The Parliament of the Dominion of Canada was given such privileges under the British North America Act, 1867, s. 18, as it might by law provide, but such powers were not to exceed those of the Imperial House of Commons at that date. In 1868 the Canadian Federal Parliament granted to its Senate power to examine witnesses on oath, an act which was plainly invalid, because the English House of Commons had not this power of examining witnesses in 1867, when the British North America Act was passed. In 1873 the Canadian Parliament conferred this privilege on both of the Canadian Houses. The Governor-General, after assenting to the Act, referred it to the Imperial Government and the Act was disallowed. To make the position clear the Imperial Parliament, in 1875, passed an Act under which the Dominion Parliament was enabled to confer privileges on its Houses, which were not to exceed those enjoyed by the House of Commons in England, at the passing of the Act of the Dominion Parliament defining the privileges thus taken. The privileges of the Canadian Parliament have therefore no longer been limited to those of the English Parliament at the passing of the British North America Act, 1867.

It will be seen, therefore, that though none of the colonial legislatures have privileges by the common law introduction of any *jus et consuetudo parlamenti*, they practically all have privileges described and limited in general terms in their constitutions and expressly provided for by subsequent Acts, or, where the constitutions are silent about privileges, they have obtained express privileges under their own Acts (see *post*, pp. 133, 134).

· **Introduction of English statute law into a settled colony.**—The common law of a settled colony consists of the common law

of England at the time of the effective settlement, and so much of the statute law of England as was applicable to the colony at the time of the effective settlement, having regard to the locality and circumstances of the settlers; but once the settlers obtain a form of self-government, statutes passed by the Imperial Parliament do not relate to such colonies unless they are made specifically applicable by Act of the Imperial Parliament, by provisions contained in such Acts themselves or by other Acts, or by implication from their nature it is apparent that they were intended by the Imperial Parliament to so apply. This rule has led to difficulties in the past, because it may have happened that, before a colony was effectively settled, an Act was passed upon a certain subject which, when the colony became settled, became part of its common law by virtue of the settlement, and after the colony has obtained self-government, the Imperial Parliament in England has passed further Acts extending or amending the law contained in the first Act introduced into the colony by settlement, but without stating that they shall apply to the colonies. At one time it was thought that the further Acts might by implication be held to apply to a settled colony, although, in the meantime, it might have obtained a measure of self-government. Numerous decisions have shown that the later Acts do not apply, unless it is certain from their nature that they were obviously intended to apply. The following case illustrates the difficulty:—

In *Pitt v. Lord Dacre* (1876), 3 Ch. D. 295, the facts, stated briefly, were, that a testator, Peter Beckford, died in 1810, leaving estate in Jamaica to trustees to the use that the daughter Harriet should, out of the estate, receive for life an annuity of £200 per annum, and to her children afterwards. The annuity was paid for many years until December, 1842, when it ceased to be paid. Harriet died in 1858, with £2,150 owing. She appointed £199 19s. a year of the annuity to her three daughters for life, and to the survivors and survivor, and after the death of the survivor to her son Henry for life, and after his death to his son Horace for life.

After 1866 the estate in Jamaica became waste and no income was obtained from it. Later, Lord Dacre, who in 1866 had

succeeded to the estate under a will dated 1862 of Baron Rivers, a grandson of the testator, upon trust for sale and disposition of the proceeds as in the will mentioned, had taken certain proceedings to get the estate better managed, and in 1870 received rents and profits amounting to £500, which he paid into Court. It was argued on behalf of Harriet, *inter alia*, that in addition to her claim to £2,150 being the amount which had accrued between December 25, 1842, and September 29, 1858, and due to her daughters and others under her and their wills, she was entitled to a further sum of £2,100, and that the Statute of Limitations did not apply to Jamaica. The Statutes of Limitations in force in Jamaica before 3 & 4 Will. 4, c. 27, were 32 Hen. 8, c. 2, s. 4, and 21 Jac. 1, c. 16, which did not apply to distress or claims for rentcharges whether created by deed or will. It was held that colonial lands are not bound by English statutes unless expressly named in them, or unless the colonial legislature re-enacts the statutes. Although the annuities would not be recoverable in England after a period when, in consequence of the Statute of Limitations (3 & 4 Will. 4, c. 27) they became statute-barred, this statute did not apply in Jamaica, and the annuities were accordingly recoverable. (See also *Mayor and Citizens of Canterbury v. Wyburn and the Melbourne Hospital*, [1895] A. C. p. 89, *cit. supra*.)

The difficulty of deciding what statutes come into force in a colony, and remain in force after its effective settlement, until repealed or amended by Acts of an after-acquired legislature, has been avoided in many colonies by subsequent provision of their legislatures declaring, in general terms, to what extent the English statutes are to obtain. Thus, by an Act of 1859 the Provinces of Upper Canada are considered to have the common law and such of the statute law of England as was applicable in 1792. New Zealand, by the Constitution Act, 1852, has taken the law of England and so much of the statute law as was applicable at that date. Hong Kong took April 5, 1873 (fixed by Ordinance 12, 1873); Fiji, January 2, 1875 (Ordinance 14, 1875); Tobago the year 1841; Falkland Islands, 1900; St. Helena, 1868.

The common law and existing statute law of a colony acquired

**by conquest or cession.**—The rules for determining the common law of a colony acquired by conquest or cession are altogether different from the rules above described for determining the common law of a colony acquired by settlement. A conquered colony is considered to have the common law and such of the statute law as is applicable to it of the country lately occupying it, as fixed by the date of the treaty of cession or date of effective conquest. The colony is looked upon as having the common law of the country from which the settlers come who first effectively settle it. Just as English settlers are supposed to take with them the statute law of their country of origin, such as is applicable to them in their new surroundings in the infant country, so foreign settlers are supposed to take with them of the common law of their native country and so much of its statute law as becomes effective there. After conquest the common and statute law remain in force, such as it was before the conquest, until it is expressly repealed or amended, first by laws or ordinances of the Imperial Parliament or Government, or later by Acts or ordinances of its own legislature, if at a future date it is granted a measure of self-government. This rule explains the diversity of laws which obtain in the various British colonies which in the past have been acquired by conquest. Thus, in Quebec and Mauritius the common law is the common law of France of the *ancien régime*. In Ceylon, Guiana, the Cape of Good Hope and Natal, the common law is Roman-Dutch. This rule explains how the relationship between husband and wife in the Cape Province is settled on principles totally different from the rules of law in England, while in Quebec land has never passed to the eldest son, as it did prior to 1926 under the law of primogeniture in England, but has always been divided between the children in equal portions.

Difficulties similar to those already described in regard to settled colonies arise in deciding how far statutes passed by the government of the country recently occupying conquered colonies were applicable and became part of the common law of the colony taken out there by the foreign settlers. Thus, in *Symes v. Cuvillier* (1880), 5 A. C. 138, Marie Anne Claire Symes, then a single woman, on May 29, 1866, by notarial deed gave an annuity

to her cousin Marie Angelique Cuvillier in trust for her five daughters "pour partie de leurs frais de toilette et autres petits besoins personnels," the capital sum being thereby settled upon the daughters after their mother's death. The donor subsequently refused to pay the instalments and pleaded that the gift had, under Canadian law, been revoked by the birth of children, she having meantime been married to the Marquis Bassano, who was joined as a co-defendant and co-appellant. Article 812 of the Civil Code of Lower Canada provided: "812.—In gifts, the subsequent birth of children to the donor does not constitute a resolutive condition, unless it is so stipulated." But this Article did not come into force until August, 1866, some two months after the date of the gift, and therefore did not govern the gift. The validity of the gift therefore depended upon the law touching the revocation of gifts applicable to such a gift obtaining in Lower Canada prior to its conquest. It was established that Louis XIV, in 1663, had established a Conseil Supérieur and Courts of Justice for Lower Canada, and directed that the "Coutumes de Paris" should be general throughout the province. Under the "Coutumes de Paris" a gift was not revoked by the event of a child being born to the donator, unless the gift were out of proportion to the means of the donator. In this case the amount of the gift amounted only to about a one-hundredth part of the donator's whole estate, and was clearly not revoked if governed by the Edict of 1663. But in 1731 Louis XV had issued an "ordonnance sur les donations," which provided that gifts by persons who had no children at the time of the donation should be revoked by the birth of a child to the donator without reference to the size of the gift, or its proportion to the fortune of the donor. The Act of 1731 was never registered in Canada, but if it could be proved ever to have been the law of Canada, it would still be the law of Canada, and govern the validity of this gift made in 1866 and revoke it. The Court held that there was no evidence that it ever had been applicable in Canada and the gift was governed by the law introduced by the original Edict of 1663, which made it still valid (b). \*

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(b) See also *Le Mesurier v. Le Mesurier*, [1895] A. C. 517. Under the

To this rule that, in a conquered territory, the common law there obtaining is the common law of the country previously occupying it, there is thought to be an exception in so far as social institutions, legal rights, or family customs not merely contrary but repugnant to the common law of England will not be tolerated after conquest. Thus slavery may be recognised as a social institution prevalent among a protected native race, as, for instance, until recently in the Protectorate of Sierra Leone, but as soon as such territory is made British by annexation or conquest, such institutions as slavery, suttee, female infanticide, obtaining evidence from witnesses by torture, and other practices repugnant to the principles of English law, though protected, legalised or allowed to pass unpunished under the indigenous laws of the conquered territory, will not be tolerated under any form of British administration, and become illegal whether declared to be so by statute or not. Thus, in the "Proceedings before the Court of King's Bench at Westminster in the case of Thomas Picton, Esq., sometime Governor and Commander-in-Chief over and on the island of Trinidad in the West Indies on an indictment for a misdemeanour in causing torture to be inflicted upon Luisa Calderon, a free mulata in the Island of Trinidad aforesaid" (30 State Trials, 225), General Picton was charged under the Imperial Acts 11 & 12 Will. 3, c. 12 and 42 Geo. 3, c. 85 (commonly called the Governors Acts, 1699 and 1802).

The Island of Trinidad had been taken from Spain by the fleet under Sir Ralph Abercrombie, who had appointed General Picton Governor of the island. While acting as Governor he signed an order for the torture of Luisa Calderon, a mulata girl of fourteen, who, to induce her to give evidence against her lover, afterwards charged on her evidence with robbery, was bound by the wrists and drawn off the ground by a rope passed over a pulley, and allowed to hang by the wrists with bare foot resting on a wooden spike. While in this torment she was lowered from time to time on to the spike until she made the confession on which her lover was charged. Blackstone, 4 Com. 326, was

quoted as authority that torture was opposed to the law of England. "The trial by rack is utterly unknown to the law of England, though once, when the Dukes of Exeter and ~~Suffolk~~ and the ministers of Henry VI had laid a design to introduce the civil law into this kingdom as the rule of Government for a beginning thereof they erected a rack for torture which was called in derision the Duke of Exeter's daughter, and still remains in the Tower of London, where it was occasionally used as an engine of State, not of law, more than once in the reign of Queen Elizabeth. But when upon the assassination of Villiers, Duke of Buckingham, by Felton, it was proposed in the Privy Council to put the assassin to the rack in order to discover his accomplices, the Judges being consulted declared unanimously to their own honor and the honor of the English law: that no such proceeding was allowable by the laws of England." Counsel defending Picton admitted this, but set up a defence contending *inter alia* that under the Code of Spanish law administered in the Island of Trinidad prior to its conquest in 1797, the torture of witnesses was admitted and habitually used. The prosecution denied this, or alleged in the alternative that if torture were used under the Spanish administration, since it was totally opposed to the principles of English law, it was illegal if imposed by a British Governor. The trial dragged on for eight years, and was, owing to the exigencies of the public service, several times adjourned. General Picton was slain at Waterloo before judgment was passed, but it is generally thought that had he lived he would have been found guilty, though the sentence would have been a slight one.

It must be noticed that a custom to become illegal as contrary to the principles of British law, must be a custom contrary to law, and not merely contrary to the general code of morality observed in England. Thus, in India and many British colonies polygamy is not interfered with among natives, nor marriages within degrees of relationship which in England would make them incestuous. In several parts of India and Ceylon polyandry exists and a wife may cohabit with and have marital relations with a father and his several sons without the law in any degree interfering.

## CHAPTER III.

THE VALIDITY OF COLONIAL LEGISLATION UNDER THE COLONIAL LAWS VALIDITY ACT, 1865—THE HABEAS CORPUS ACT, 1862—EXTRA-TERRITORIAL JURISDICTION OF THE CROWN—THE FOREIGN JURISDICTION ACTS—EXTENSION OF BRITISH JURISDICTION OUTSIDE BRITISH TERRITORY—CONFLICT OF LAWS WITHIN THE EMPIRE—NATIONALITY WITHIN THE EMPIRE—NATIONALITY OF PERSONS RESIDENT IN AN ANNEXED TERRITORY—NATURALIZATION—THE MERCHANT SHIPPING ACTS—COPYRIGHT.

Seeing that the common law brought into a settled colony is the common law of England at the date of its effective settlement or at some other date fixed arbitrarily by its Legislature, and so much of the statute law of England as is applicable to the settlers in their new surroundings, in the early days of responsible government it was a matter of doubt how far a Legislature might go in passing laws which might be thought to be repugnant to the common law of England and any statutes passed by the Imperial Parliament previously or subsequently to the establishment of responsible government in the colony. The controversy was brought to a head by the action of Benjamin Boothby, Judge of the Supreme Court of South Australia, who in his decisions declared one Act of the Legislature of South Australia after another invalid on such grounds. (See Keith on Responsible Government in the Colonies, vol. i, p. 402.) He impeached the validity of the Constitution Act itself (No. 2 of 1855-6) on various grounds, while he held a Real Property Act to be invalid because it deprived the suitor in real property cases of trial by jury as provided in Magna Charta. In 1860 Great Britain had signed the Cobden Treaty with France under which it reduced its duty on brandy to 8s. By its Customs Act the Legislature of South Australia had imposed a duty of 10s., and on these grounds Judge Boothby held the Act to be invalid. A

series of questions were addressed to the Law Officers of the Crown asking for their opinion on the points at issue between Judge Boothby and the Colonial Government.

The questionnaire *inter alia* asked in substance how far the Supreme Court was entitled to inquire into the validity of an Act of the Colonial Legislature, whether a Judge is bound to pronounce on the validity of a Colonial Act because it is inconsistent with those of an Imperial Statute intended by the British Parliament to extend to the colonies; whether an Act is invalid because its provisions are contrary to the fundamental principles of British law—because, for example, it allows slavery or polygamy, prohibits Christianity, authorises the infliction of punishment without trial, or the uncontrolled destruction of aborigines, etc. The Law Officers were asked to what extent a single provision invalid on account of repugnancy with English law would vitiate the rest of the Act, and some minor points bearing upon the attitude of distrust in colonial legislation which Mr. Boothby had taken up. The Law Officers' replies amounted in substance to this: that they were of the opinion that the Supreme Court of the colony was bound to inquire into the validity of an Act of the Colonial Legislature, the provisions of which it was called upon to administer; an Act of the Colonial Legislature inconsistent with an Imperial statute intended to apply to the colony would be thereby rendered invalid. They refused to draw a distinction between fundamental and ordinary rules of law, and considered that an Act of a Colonial Legislature would not be invalid because it was repugnant to the principles of English law. If an Act contains various distinct and separable provisions, one of such provisions rendered invalid on account of repugnancy would not vitiate other provisions of the Act, which might be free from that defect.

About this time (1865) occurred the negro rebellion in Jamaica, which was followed in 1866 by a bill passed by the Legislative Council of Jamaica House of Assembly and Governor to indemnify Edward John Eyre, officers and other persons who had acted under his authority in trying, convicting and punishing the rebels. Meanwhile the Colonial Laws Validity Act had been passed in England by the Imperial Parliament to remove in

particular the doubts affecting the validity of South Australian legislation. The Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63) is a short Act entitled "An Act to remove doubts as to the validity of Colonial Laws," and provides :—

1.—The Term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony;

The Term "Colonial Law" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council;

An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament;

The Term "Governor" shall mean the Officer lawfully administering the Government of any Colony;

The Term "Letters Patent" shall mean Letters Patent under the Great Seal of the United Kingdom of *Great Britain and Ireland*.

2.—Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3.—No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of *England*, unless the same shall be repugnant to the Provisions of some Act of Parliament, Order, or Regulation as aforesaid.

4.—No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any instrument other than the Letters Patent or Instrument authorising such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-named Instrument.

5. Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to

establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

6.—The Certificate of the Clerk or other proper Officer of a Legislative Body in any Colony to the Effect that the Document to which it is attached is a true Copy of any Colonial Law assented to by the Governor of such Colony, or any Bill reserved for the Signification of Her Majesty's Pleasure by the said Governor, shall be *prima facie* Evidence that the Document so certified is a true Copy of such Law or Bill, and, as the Case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying Her Majesty's Disallowance of any such Colonial Law, or Her Majesty's Assent to any such reserved Bill as aforesaid shall be *prima facie* Evidence of such Disallowance or Assent. And whereas Doubts are entertained respecting the Validity of certain Acts enacted or reputed to be enacted by the Legislature of South Australia: Be it further enacted as follows:

7.—All Laws and reputed Laws enacted or purporting to have been enacted by the said Legislature, or by Persons or Bodies of Persons for the Time being acting as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever; provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any Law.

The criminal prosecution against Governor Eyre (*The Queen v. Eyre* (1868), L. R. 3 Q. B. 487), charging him under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85 (the Governors' Acts), was

abortive, because the grand jury threw out the bill of indictment and the magistrate refused to commit. In the civil action Phillips v. Eyre (1869), 4 Q. B. 225, the point that the Act of Indemnity was invalid as being contrary to English common or statute law was never taken, probably in view of the recent Colonial Laws Validity Act, 1865, but to the defendant's plea that he was covered by the bill of indemnity, the plaintiff replied that the defendant, at the time of the passing of the Act, was the Governor of Jamaica and was a necessary party to the passing of the Act, and the Act could not have become the law of Jamaica without the defendant's assent as Governor. Cockburn, C.J., held : "There is no ground whatever for saying that the governor of a colony cannot give his official consent to a legislative measure in which he may be individually interested. It might as well be asserted that the Sovereign of these realms could not give assent to a bill in parliament in which the Sovereign was personally concerned." Judgment was accordingly given for the defendant.

In McCawley v. King; Att.-Gen. for England, Intervener, [1920] A. C. 691, an Act of the Queensland Government, which provided for the appointment of a Judge to hold office for seven years, was impeached on the grounds that under section 15 of the Constitution of Queensland Act, 1867, Judges were to hold office during good behaviour. It was held that the Legislature of Queensland had power both under the Colonial Laws Validity Act, 1865, and apart therefrom to appoint a Judge for a limited period.

There may, however, be provisions in a colonial Act which, being invalid owing to their conflicting with an Imperial Act applicable to the colony, are not merely invalid in themselves, but by being so interwoven with other measures contained in the colonial Act as to be inseparable from them, thereby render the whole invalid. Thus the Constitution of Canada is contained in the British North America Act, 1867, an Imperial Act which cannot, as regards provisions in it affecting the Dominion Government, the Governor-General and the Lieutenant-Governors, be altered by an Act of the Dominion or a Provincial Government. The Legislature of a province under section 92,

head 1, may amend its constitution, " excepting as regards the office of Lieutenant-Governor." An Act of the Provincial Legislature which therefore affects the constitutional status of ~~an~~ Lieutenant-Governor is to that extent invalid, because it is opposed to both the British North America Act, 1867, and the Colonial Laws Validity Act, 1865. In *Re The Initiative and Referendum Act*, [1919] A. C. 935, the facts were that, in 1916, the Province of Manitoba passed an Initiative and Referendum Act which would have made it possible for bills to be referred to the Manitoba electorate and become law without the subsequent assent of the Lieutenant-Governor as required by section 90 of the British North America Act, 1867. On appeal direct from the Appeal Court of Manitoba the Privy Council held the Act invalid, since it would compel the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by those voters. The offending provisions of the Act being so interwoven with its scheme as not to be severable, the Colonial Laws Validity Act, 1865, could not be applied to validate any part of the Act.

In several cases subsequent to *Phillips v. Eyre* it has likewise been contended that a colonial Act or Governor's order has been invalid as being contrary to the fundamental principles of English law and justice. Provided that the Act in question has been within the powers of the colonial Legislature, a colonial law has never been upset on these grounds.

Thus, in *Riel v. Regina* (1885), L. R. 10 A. C. 675, the petitioner had taken part in a rebellion and had been tried and convicted of treason by a Court consisting of a stipendiary magistrate, a justice of the peace, and a jury of six, with a right of challenging six. He appealed on the grounds that he had been tried without the preferment of the charge by a grand jury or coroner's inquisition, and the evidence produced before the magistrate had never been taken down in writing as is required in England by statute. It was contended on his behalf that treason in Canada was governed as in England by the Act 7 & 8 Will. 3, c. 3, and he was entitled to be tried before a Judge

and by a jury of twelve, with the right of challenging thirty-five. The Court which tried Louis Riel had been set up under an Act of 1880 (43 Vict. c. 25, s. 7) of the Dominion Parliament, providing (*inter alia*) for the administration of justice in the North-West Territory of Canada in which the rebellion had taken place. The Privy Council held that the Act of 1880 of the Canadian Parliament was not outside the powers given it by the British North America Act, 1871, s. 4, which provided that the Canadian Parliament was authorised to make provision for the administration, peace, order and good government in these territories. The appeal of the petitioner accordingly was disallowed (a).

In a similar case, *Tilonko v. Att.-Gen. of Natal*, [1907] A. C. 93, the petitioner was not a military man and had not been taken in the field bearing arms, and he had been charged on an indictment of sedition and convicted before a court-martial presided over by a military commander. The military Court had been set up upon a proclamation of martial law under the authority of a Colonial Office circular dated January 26, 1867, and a mandate addressed by the Governor to the Commandant of Militia dated February 11, 1906. The petitioner contended that a state of war did not exist at the time of his trial, and the powers of the common law were sufficient for the civil power to maintain order. The petitioner accordingly submitted that his trial before the military tribunal was without jurisdiction and illegal. The Privy Council held that the conviction must stand because, whether a state of war existed or not, and whether these military Courts had been properly constituted or not, the Natal Government in 1906 had passed an Indemnity Act, section 6 of which had enacted that all sentences passed by any courts-martial or by any Court or person administering martial law under the authority of the Governor or of the Commandant of Militia of Natal should be lawful, and in so far as they had been carried into effect deemed to be final sentences. The Act had, so to speak, legalised the decisions of the courts-martial in advance, and the Privy

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(a) Similarly, when actual war is waging, acts done by the military authorities are not justiciable by the ordinary tribunals, and the fact that for some purposes some tribunals are in operation is not conclusive that war is not raging : *Ex p. Marais*, [1902] A. C. 109.

Council could not inquire into their validity; the appeal must accordingly be dismissed and the appellant must pay the costs.

In *Re Zaghlul Pasha* (1923), 67 S. J. 382, an Egyptian statesman appealed to the Privy Council from the validity of an order for his detention made by the Governor of Gibraltar under a local ordinance enacted by the Governor, who, under the constitution of the colony, has the sole legislative power. It was argued in his behalf that it was not an "act for the peace, order and good government" of Gibraltar that an aged Egyptian patriot should be detained in Gibraltar and prevented from returning to Egypt. The Privy Council, however, held that the power of the Crown being absolute until it is parted with by the Crown, the ordinance was valid. The Crown, through the Secretary of State for the Colonies, has a power of disallowance, and therefore the Court could not inquire into the alleged injustice of the ordinance.

**Habeas Corpus: The Habeas Corpus Act, 1862 (26 & 26 Vict. c. 20).**

The writ of *habeas corpus* originally ran to any part of the dominions of the Crown, including Ireland, Berwick-upon-Tweed, the Isle of Man, the Channel Islands and the colonies. At the time when Calais formed a possession of the Crown it also lay there, and also within territorial waters and in bays and creeks which do not form part of any particular county in England. As the writ originated in England, and its issue became regulated by the principles of English common law before the union of the two crowns under James I, and long before the Act of Union, the writ has never run in Scotland, and its issue there is unknown.

After the growth of self-government in the colonies it became obvious that it would be inconvenient if the Courts in England were to be called upon frequently to issue writs to bring up the bodies of prisoners held in custody in the self-governing dominions. In *Ex p. Anderson* (1861), 3 E. & E. 487, application was made to the King's Bench in England for a writ of *habeas corpus ad subjiciendum* to be issued to the sheriff of the City of York in Canada, and to the keeper of the gaol in Toronto, to bring up the body of John Anderson who was there alleged to be

unlawfully kept in prison. The Court, while not doubting its power to issue the writ and the common law right to demand it, was sensible of the inconvenience which might result from such a step, and it felt that its issue might be inconsistent with that higher degree of colonial independence, both legislative and judicial, which they recognised as already existing. The writ was accordingly issued, but the decision led to the passing of the Habeas Corpus Act, 1862, which enacts that no writ of *habeas corpus* shall issue out of England by authority of any English Judge or Court of Justice into any colony or foreign dominion of the Crown where the Crown has a lawfully established Court or Courts of Justice, having authority to grant and issue the writ and to ensure its due execution throughout such colony or dominion.

The writ originally ran in all parts of Ireland, but since the establishment of the Irish Free State as a self-governing dominion, the Habeas Corpus Act, 1862, there applies, and the English Courts have no longer power to issue writs in respect of persons arrested or imprisoned in Southern Ireland. (See *Secretary of State v. O'Brien* (1923), 92 L. J. K. B. 830; [1923] A. C. 608; *post*, pp. 130, 216).

Where application is made to a Judge of a colonial Court for issue of the writ, and the Judge refuses to issue the writ because he is of opinion that the detention is lawful, application may be made to other Judges, and each Judge and a Court of Appeal must listen to the application on its merits, even though other Judges have refused a similar application (*Eshugbazi Eleko v. Officer Administering the Government of Nigeria*, [1928] W. N. 175).

### The Foreign Jurisdiction Acts.

**Jurisdiction in the Colonies.**—The Colonial Laws Validity Act, 1865, remains the Magna Carta establishing the validity of laws passed by colonial Legislatures. But from an early date the problem confronted the British Government how to provide for the validity of orders, made respecting persons not British subjects, to be enforced in territories not British. The history of the process by which British jurisdiction has been extended to persons outside the British Dominions in such territories as protectorates is long and unmarked by any direct line of policy. It may be considered to have begun in a statute of Richard II,

1863, which gave the High Admiral's Court criminal jurisdiction over the crew of any British vessel, whether the crew were of British nationality or not, and over anyone in cases of piracy at common law. The procedure of the Admiral's Court was not satisfactory, because the witnesses against seamen were usually other seamen who went aboard their vessels and were not forthcoming to give evidence at the time of trial. Accordingly, in the reign of Henry VIII, 1536, an Act was passed which transferred the criminal jurisdiction of the Admiralty Court to Commissioners appointed by the Crown to hear such offences summarily, as though they had been committed on land. An Act of 1799 enabled the Commissioners to hear all offences committed on the high seas. (See Holdsworth, *History of English Law*, vol. i, p. 551.) As the three or four persons appointed to be Commissioners were invariably the common law Judges, the criminal jurisdiction of the Admiralty Court was imperceptibly transferred to the common law Courts, until in 1834 an Act was passed transferring such jurisdiction of the Commissioners in London to the Central Criminal Court, and in 1844 an Act enabled Judges on circuit to try offences committed at sea at assize towns nearest to the port where a ship first put in, and a seaman was first charged before a magistrate.

There still remained the difficulty of dealing with offences which were committed at sea, where the ship did not put into port in England immediately, but touched at some port in a British colony. To avoid the unsatisfactory process of bringing the prisoners back to England to be tried at the Central Criminal Court, or at that time by the Court of Admiralty, an Act was passed in 1849 (12 & 13 Vict. c. 96) : ". . . to provide for the Prosecution and Trial in Her Majesty's Colonies of offences within the jurisdiction of the Admiralty," which extended the Act of 11 Will. 3 : "An Act for the more effectual suppression of piracy," and an Act of 46 Geo. 3 : "An Act for speedy trial of offences committed in distant parts upon the sea," and provided that, "all persons charged in any colony with offences committed on the sea may be dealt with in the same manner as if the offences had been committed on water within the local jurisdiction of the Courts of the Colony, and persons

convicted of such offences shall suffer the like punishments as in England." The Act of 1849 also contained provisions for the trial of murder and manslaughter, where death only happens in the colony or upon the sea; in such circumstances persons might be charged as though the offence happened completely in the colony, and by the Courts (Colonial) Jurisdiction Act, 1874 (37 & 38 Vict. c. 27), s. 3, the punishment is to be such as is prescribed by the law of the colony, or such as most nearly corresponds to the punishment applicable by the law in England.

The Admiralty Offences (Colonial) Act, 1849, covered the case where a crime was committed on the high seas and the ship put into a port in one of the British colonies. The difficulty still remained of how to deal with a prisoner who being accused of having committed a crime in one colony, fled to and was apprehended in England or in another colony. This was met by the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), which provides (*inter alia*) that a person, accused of having committed an offence in one of Her Majesty's Dominions, leaving and going to another, may be apprehended under an endorsed or provisional warrant issued:—

1. By the Judge of the Superior Court in such part.
2. By the Secretary of State of the United Kingdom and one of the Bow Street magistrates.
3. In a British possession by the Governor of that possession, and be brought before a magistrate and charged as if he had committed an act within the jurisdiction, and returned to the place from whence he came; and if he is there found not guilty he is to be sent back to the place where he was apprehended, free of charge. The offences included are treason, piracy, and every offence punishable, when committed, by twelve months' imprisonment with hard labour, or more.

The Act applies also to an offence committed on a ship within the territorial waters of a country to which the Act has been extended by Order in Council (*R. v. Spilsbury*, [1898] 2 Q. B. 615; *R. v. Brixton Prison (Governor)*; *Ex p. Percival*, [1907] 1 K. B. 696).

The Colonial Prisoners Removal Acts, 1869 and 1884 (32 & 33 Vict. c. 10 & 47 & 48 Vict. c. 31), further provide that where as

regards any prisoner undergoing sentence of imprisonment in any British possession for any offence it appears to the removing authority, that is to say, the Secretary of State acting with the concurrence of the Government of every British possession concerned,

- “ (a) that it is likely that the life of the prisoner will be endangered or his health permanently injured by further imprisonment in such British possession ; or
- “ (b) that the prisoner belonged, at the time of committing the said offence, to the Royal Navy or Her Majesty's regular military forces ; or
- “ (c) that the offence was committed wholly or partly beyond the limits of the said British possession ; or
- “ (d) that by reason of there being no prison in the said British possession in which the prisoner can properly undergo his sentence, or otherwise the removal of the prisoner is expedient for his safer custody, or for more efficiently carrying his sentence into effect ; or
- “ (e) that the prisoner belongs to a class of persons who under the law of the said British possession are subject to removal under this Act ;

in any such case the removing authority may, subject nevertheless to the regulations in force under this Act, order such prisoner to be removed to any British possession or to the United Kingdom to undergo his sentence or the residue thereof.”

A prisoner so removed may be returned by authority of the Government of the possession to which he is removed ; and at the expiration of his sentence a prisoner is entitled to be taken back free of cost to the British possession from which he was removed. When a prisoner has been ordered to be removed or returned, his removal must be authorised by a warrant signed by a Secretary of State or by the Governor of the possession concerned. The Colonial Prisoners Removal Act of 1884 contains also several minor provisions for the apprehension and custody of criminal lunatics in British possessions. It was by virtue of this Act of 1884 that the British Government during the Boer War were enabled to round up and deport to St. Helena persons charged with treason or sedition in Cape Colony and Natal. The Colonial Prisoners Removal Act, 1884, has been applied to

Abyssinia (1913), Zanzibar (1914), Nyasaland Protectorate (1914), and Somaliland Protectorate (1926). Under section 18 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), His Majesty may by Order in Council suspend the operation of the Act in a colony, or direct that any part of it shall have effect within such colony with or without modifications, as if it was part of the Imperial Act. The Imperial Extradition Act, 1870, has been extended into the majority of those Crown colonies which have no extradition laws of their own, and thus a person who commits a crime in a foreign country can no longer escape justice as formerly by taking refuge in a remote portion of the British Empire where an extradition treaty did not apply, because the Extradition Act did not apply there.

By the Admiralty Offences (Colonial) Act, 1849, the criminal work of the Admiralty Court in respect of offences committed on colonial coasting vessels putting in at colonial ports had been transferred to the appropriate colonial Courts. Civil jurisdiction over such matters as casualties and prize still remained with the English High Court. By the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), colonial Legislatures were enabled to establish Colonial Courts of Admiralty with the same jurisdiction in manner and extent as the High Court in England, and any Vice-Admiralty Court then existing upon the establishment of a Colonial Admiralty Court would be abolished. By section 9 of the same Act, in British possessions, where the Legislatures have not established Courts having Admiralty jurisdiction, His Majesty can still empower the Admiralty to establish Vice-Admiralty Courts to have jurisdiction over prize, His Majesty's Navy, questions arising under the Foreign Enlistment Act, 1870, and the Pacific Islanders' Protection Acts, 1872 and 1875, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law.

There still remained the problem of administering effective justice in sparsely settled countries which as yet acknowledged no form of government, but which might in the future become British possessions. In the early eighties of the last century the powers in Europe were engaged in a scramble for territory in Africa, then an unknown continent, and the British Government

was anxious to give the appearance of effective settlement to portions of West and East Africa where Britishers had settled, but which had not been formally annexed as British territory.<sup>1</sup> Accordingly, in 1887, the year of the Queen's Jubilee, the British Settlements Act (50 & 51 Vict. c. 54), was passed, which recites : " Whereas divers of Her Majesty's subjects have resorted to and settled in, and may hereafter resort to and settle in, divers places where there is no civilised government, and such settlements have become or may hereafter become possessions of Her Majesty, and it is expedient to extend the power of Her Majesty to provide for the government of such settlements, and for that purpose to repeal and re-enact with amendments the existing Acts enabling Her Majesty to provide for such government." And provides that His Majesty in Council may establish such laws and institutions and Courts, and appoint Judges as may appear necessary for the peace, order and good government of His Majesty's subjects and others within any British settlement. A British settlement is defined as meaning " any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession." Power is given the King in Council also to confer jurisdiction on any existing Court of a British Possession over a so defined British settlement.

**Extension of British jurisdiction outside British territory.**—The Admiralty Offences (Colonial) Act, 1849, was included in the First Schedule of the Foreign Jurisdiction Act, 1890, which might, by Order in Council, be extended to apply to protectorates, so that the Courts of many territories not British have since obtained power to try British and foreign subjects for offences committed on board British ships, which first put into port there.

Meanwhile, chiefly as a result of its efforts to stamp out the slave trade on the Gold Coast, the British Government had been forced to come to agreements with the native rulers on the West Coast of Africa and make with them treaties which amounted to establishing protectorates over large hinterlands. In 1843 the first of the Foreign Jurisdiction Acts was passed providing for

the trial of British subjects within such protected territories. In 1857, Acts were passed relating to the administration of Siam, and in 1861 and 1863 relating to territories adjacent to Sierra Leone.

Then followed two Foreign Jurisdiction Amendment Acts of 1865 and 1866. In 1870 a further Act was passed relating to Siam and the Straits Settlements, which was again followed in 1875 and 1878 by two further Foreign Jurisdiction Acts. Section 4 of the Foreign Jurisdiction Act, 1878, provided : " An order in council purporting to be made in pursuance of the Foreign Jurisdiction Acts, 1843 to 1878, or any of them, shall be deemed a colonial law within the Colonial Laws Validity Act, 1865."

By this time the law relating to the validity of legislation and Courts set up in countries not within the British dominions was contained in the Foreign Jurisdiction Acts, 1843 to 1878, and numerous other Acts. In 1881 occurred the insurrection of Arabi Pasha in Egypt, followed by the abolition of the dual control and the establishment of a purely British protectorate and consular Courts throughout the country. Accordingly in 1890, to make the position of British administration clearer in Egypt and other British protectorates, the Foreign Jurisdiction Act, 1890, was passed, which repealed the existing Foreign Jurisdiction Acts, 1843-78, and some special Acts relating to particular protectorates, and consolidated the law relating to the validity of British legislation and Courts outside British dominions. It also enabled the Crown, by subsequent Order in Council, to extend to such countries the provisions of the Admiralty Offences (Colonial) Act, 1849, already mentioned, the Evidence Act, 1851, the Foreign Tribunals Evidence Act, 1856, the Evidence by Commission Act, 1859, the British Law Ascertainment Act, 1859, the Admiralty Offences (Colonial) Act, 1860, the Foreign Law Ascertainment Act, 1861, and certain portions of other statutes.

The Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), provides :—

" 1.—It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty

had acquired that jurisdiction by the cession or conquest of territory.

“ 2.—Where a foreign country is not subject to any government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act (that is by treaty, capitulation, grant, usage, sufferance and other lawful means) Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty’s subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of other provisions of this Act.

“ 3.—Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.

“ 4. If in any proceeding, civil or criminal, in a court in Her Majesty’s dominions or held under the authority of Her Majesty any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign country, a Secretary of State shall, on the application of the court, send to the court within a reasonable time his decision of the question, and his decision shall for the purposes of the proceeding be final.

“ (2) The court shall send to the Secretary of State, in a document under the seal of the court, or signed by a judge of the court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned by the Secretary of State to the court, and those answers shall, on production thereof, be conclusive evidence of the matters therein contained.”

Section 6 provides that a person charged before a British Court in a foreign country may be sent for trial to any British possession for the time being appointed by Order in Council, and he may be tried there as though the offence has been committed within the jurisdiction of its Court; and section 7 provides that a person sentenced in a foreign country may be sent to a British possession, appointed by Order in Council, to be executed or serve his sentence. These provisions were intended to make the task of administering justice easier in countries where the trial and

punishment of Europeans would have a demoralising effect upon a large native population, or conditions were such that the accused would not be certain to have a fair trial. Under these sections British subjects are frequently deported from Siam to Singapore, and from China to Hong Kong, Turkey and Persia to Malta and Gibraltar, and the islands of the Western Pacific to Fiji.

Section 11 provides : " Every Order in Council made in pursuance of this Act shall be laid before both Houses of Parliament forthwith after it is made, if Parliament be then in session, and if not, forthwith after the commencement of the then next session of Parliament, and shall have effect as if it were enacted in this Act."

" 12—(1) If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country, or repugnant to any order or regulation made under the authority of any such Act of Parliament, or having in that country the force and effect of any such Act, it shall be read subject to that Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be void.

" (2) An Order in Council made in pursuance of this Act shall not be, or be deemed to have been, void on the ground of repugnancy to the law of England unless it is repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."

Although under the Foreign Jurisdiction Act, 1890, the Crown may exercise its prerogative to set up Courts which have jurisdiction over native protected persons as well as over persons of British nationality, Courts so set up usually do not extend their jurisdiction over protected native persons whose own native Courts are left to decide their disputes. Jurisdiction over Europeans of non-British nationality is exercised by the Courts with the consent of the Government of which such persons are subjects. By the Berlin Conference, 1885, all the great Powers agreed to recognise each other's jurisdiction in this respect, compelling their subjects to submit.

In the case of British West Africa, it has been provided by the West Africa Offences Act, 1871 (34 & 35 Vict. c. 8) :—

(a) That the laws in force in the West African Colonies. (Sierra Leone, Gambia, Gold Coast, Lagos) for the punishment of crimes committed within twenty miles of such colonies therein are to be extended to His Majesty's subjects within adjacent native territories.

(b) Conversely such laws may be extended to natives in adjacent territories committing offences against His Majesty's subjects.

By the Foreign Jurisdiction Act, 1913 (3 & 4 Geo. 5, c. 16), certain Acts originally intended to apply to colonies may be extended by Order in Council to foreign countries within the jurisdiction. These Acts are the Colonial Prisoners' Removal Act, 1869 (32 & 33 Vict. c. 10), the Colonial Probates Act, 1892 (55 & 56 Vict. c. 6), section 20 of the Finance Act, 1894 (57 & 58 Vict. c. 30), the Colonial Solicitors Act, 1900 (63 & 64 Vict. c. 14), and sections 34, 35 and 36 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

**Conflict of Laws within the Empire—Extra-territorial limitations—Nationality and Naturalization—The Merchant Shipping Acts—Copyright Acts.**—Since the passing of the Colonial Laws Validity Act, 1865, and the Foreign Jurisdiction Act, 1890, the legality of colonial legislation has been made thus far clear :—

(a) Until a colony has been granted a measure of self-government, it may be administered by Orders in Council, and provided such Orders in Council do not conflict with Acts of the Imperial Parliament, they are as valid as laws. But once the colony has been granted a measure of self-government, Acts of its Legislature cannot be overruled save by Act of the Imperial Parliament. Orders in Council made thereafter which are in conflict with Acts of the Colonial Legislature will be invalid. The position was here made clear as far back as 1774 in the judgment of Lord Mansfield in the case of *Campbell v. Hall*, 20 S. T. 289—354. In that case the facts were that the Island of Grenada had been acquired by conquest from the French in 1762. In October, 1763, the Crown had delegated to the Governor power to legislate with the advice and consent of a council and an assembly of representatives. In

July, 1764, letters patent were issued under the Great Seal imposing a duty upon exports from Grenada. A merchant, Campbell, then brought this action against the collector of customs to recover, on the grounds that such duty on imports was illegal duty imposed by and paid to the collector. The question of the validity of the letters patent turned upon whether the Crown, after the proclamation of 1763, could impose a new duty, and this was argued three times upon a special verdict before Lord Mansfield, C.J., who, in giving judgment for the plaintiff, affirmed the following, among other, propositions :—

1. That a country conquered by force of arms becomes a dominion of the Sovereign in right of his Crown, and therefore necessarily subject to the prerogative of the Crown, which has an absolute power to legislate by virtue of its prerogative, but if it parts with any portion of its prerogative power it cannot recall it.
2. A conquered colony is necessarily subject to the legislative power of the Imperial Parliament, which itself may therefore step in at any time and either (i) limit the prerogative, or (ii) confer further statutory powers on the Crown.
3. That the conquered inhabitants, when once received into the conqueror's protection, become British subjects and are no longer enemies or aliens; that the laws of a conquered country continue until they are altered by the conqueror; that, conceding that the Sovereign has power, without the concurrence of Parliament, to make new laws for a conquered country, although this is a power subordinate to his power of legislation in Parliament, he can make no laws which are contrary to fundamental principles, as, *e.g.*, giving exemptions from the authority of Parliament, or privileges exclusive of his other subjects.

A similar question arose in the comparatively recent case of *Sprigg v. Sigcau*, [1897] A. C. 238. The respondent Sigcau, who was native chief of Pondoland, in 1894 had made a peaceful cession of his territory to the British Crown and had become one of Her Majesty's subjects. Pondoland then came under the administration of the Government of the Cape of Good Hope which extended (*inter alia*) to the newly-ceded territories the Colonial Act, No. 24 of 1886, which contained a complete criminal code. In August, 1894, the Cape Legislature passed an Act which

was assented to by the Crown, providing for the annexation of Pondoland to the Cape Colony. Section 2 of the Pondoland Annexation Act, 1894, gave authority to the Governor to add to the existing laws already proclaimed, and put in force in the territories, such laws as he "shall from time to time by proclamation declare to be in force in such territories."

In 1895 the Governor, Sir John Gordon Sprigg, issued a proclamation "in virtue of powers invested in me by law," which set aside the established law of Pondoland with respect to arrest, trial, conviction and imprisonment and punishment, as provided in the Colonial Act, No. 24 of 1886, and condemned the respondent, Sigcau, untried and unheard, to imprisonment, the place and duration of his captivity being left to the uncontrolled will of the Governor. Sigcau appealed on the grounds that the proclamation upon which he was arrested without warrant and kept in prison without trial was invalid. The Privy Council, affirming the decision of the Supreme Court of the Cape of Good-Hope, held:—

That section 2 of the Pondoland Annexation Act, 1894, did not, according to its true construction, authorise the Governor to make new laws, but only to transplant to the new territory and enact such laws as were already in force in other parts of the colony; and that:—

The proclamation was *ultra vires* of any authority conferred upon the Governor by section 2; or of any authority at all, except that of an irresponsible Sovereign or of a supreme and unfettered Legislature.

In *The King v. Earl of Crewe, ex p. Sekgome*, [1910] 2 K. B. 576, Sekgome, a native chief, had been detained at Gaberones in the Bechuanaland Protectorate by virtue of a proclamation authorising his detention, made by the High Commissioner under powers conferred upon him by Order in Council, on the grounds that the detention of Sekgome was necessary for the preservation of peace within the protectorate. Sekgome applied for a writ of *habeas corpus* to the Secretary of State for the Colonies. The Court of Appeal distinguished these circumstances from those in *Sprigg v. Sigcau*, [1897] A. C. 238, for here the order was made in exercise of powers under the Foreign Jurisdiction Act, 1890,

and consequently the protectorate was a foreign country in which the jurisdiction was validly exercised and therefore the detention of Sekgome was lawful.

It is also clear :—

(b) The Imperial Government may still by Act of Parliament legislate for all colonies whether they have a measure of self-government or not. In practice it seldom does so save upon the initiative of a colony. The Imperial Government is considered to have legislated for the colonies when an Act of the Imperial Parliament expressly so provides and there is an obvious intention in the Act that it shall extend to the colonies, *e.g.*, the Act for the Abolition of Slavery, 1846, or the Territorial Waters Jurisdiction Act, 1878 (b).

It is more usual to specify in Imperial Acts to which dominions they are intended to apply. As a rule the Imperial Parliament no longer attempts to interfere with matters of a purely domestic nature in a colony, and legislates only when a general Act is required in the interests of the entire Empire, as distinguished from particular parts, and where it is desirable to have uniform legislation and avoid conflict of laws. Instances of such laws are :—

Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 68).

Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69).

Extradition Acts, 1870 and 1873 (33 & 34 Vict. c. 52 and 36 & 37 Vict. c. 60).

Colonial Prisoners Removal Acts, 1869 and 1884 (32 & 33 Vict. c. 10 and 47 & 48 Vict. c. 31).

British Law Ascertainments Act, 1859 (22 & 23 Vict. c. 63).

Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113).

Documentary Evidence Acts, 1868 and 1882 (31 & 32 Vict. c. 37 and 45 & 46 Vict. c. 9).

Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27).

Colonial Probates Act, 1892 (55 Vict. c. 6).

Colonial Boundaries Act, 1895 (58 & 59 Vict. c. 34).

Colonial Solicitors Act, 1900 (63 & 64 Vict. c. 14).

Demise of the Crown Act, 1901 (1 Edw. 7, c. 5).

Geneva Convention Act, 1911 (1 & 2 Geo. 5, c. 20).

Copyright Act, 1911 (1 & 2 Geo. 5, c. 47).

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(b) "No Act of Parliament made after a colony is planted is construed to extend to it without express words showing the intention of the Legislature to be that it should." *Per Lord Mansfield : Caterall v. Caterall*, 1 Robert. 581.

Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 4, sub-s. 5.  
Pensions (Governors of Dominions, etc.) Act, 1911 (1 & 2  
Geo. 5, c. 24).

Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 122.  
Air Navigation Act, 1920 (10 & 11 Geo. 5, c. 80).

(c) A colonial law which conflicts with Acts of the Imperial Parliament is invalid only to the extent that its provisions are at variance with the Act of the Imperial Parliament. But a colonial Legislature may legislate only within its own sphere, and cannot pass laws to operate outside the particular colony. Thus, in *MacLeod v. Att.-Gen. v. New South Wales*, [1891] A. C. 455, the appellant had married in 1872 a woman named Mary Manson, in New South Wales. In 1899 he was married at St. Louis in the U.S.A., to Mary Cameron, his first wife being then living. In 1883 the New South Wales Legislature had passed a Criminal Amendment Act, section 54 of which provided : " Whosoever being married marries another person during the lifetime of the former husband or wife wheresoever such second marriage takes place shall be liable to penal servitude for seven years." MacLeod appealed from his conviction for bigamy on the ground that " whosoever being married " was a term which would include any person subject of any State and resident in any part of the world, and not merely a resident in New South Wales. On this ground the section was held to be invalid, and the conviction was set aside (c).

In the case of *Att.-Gen., Canada, v. Cain; Att.-Gen., Canada, v. Gilhula*, [1906] A. C. 542, the Legislature of the Dominion of Canada had passed an Alien Labour Act in 1897 which had been amended by a further Act of 1911. These Acts made it unlawful to prepay transportation or assist importation or immigration of any alien into Canada under contract or agreement made previous to the importation of such alien or foreigner to perform labour or service in Canada. Section 6 provided :—

" The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken

into custody at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, company or corporation violating section 1 of this Act."

In 1905 the Attorney-General of Canada issued two warrants under the above Acts to take the respondents, then residing in the Province of Ontario, and return them to the United States. On being arrested, the respondents were discharged on a writ of *habeas corpus* solely on the ground that the Alien Labour Act, 1897, and amending Act cited above were invalid. The High Court of Ontario held that the Parliament of Canada had no power to pass section 6 which implied the exercise of constraining force outside the territorial limits of Canada, and that no colonial Legislature had power to enact legislation to be actively enforced beyond the boundaries of the colony. The Privy Council distinguishing *MacLeod v. Att.-Gen. for New South Wales* (*cit. supra*), held that the Crown being undoubtedly possessed of power to expel an alien from the Dominion of Canada or to deport him to the country whence he entered it, the above Act assented to by the Crown delegated that power to the Dominion Government, which permitted and authorised them to impose such extra-territorial constraint as is necessary to execute the power.

(d) Although a Governor cannot validly make orders which conflict with laws passed by the Legislature of a colony, there is nothing to prevent the Legislature of a colony delegating any of its powers to the executive or an official of the executive of the colony. Thus in *Powell v. Apollo Candle Co.* (1885), L. R. 10 A. C. 282, the Legislature of New South Wales had imposed a duty on imported candles. The Apollo Candle Co. then imported a substance called "stearine" as a substitute for candles, with the intention of evading duty. Under section 133 of the Customs Regulation Act, 1879, the Legislature had made it lawful for the Governor to direct that a duty be levied on such articles as were apparently substitutes for any known dutiable article, at a rate "fixed in proportion to the degree in which such unknown article approximated in its qualities or uses to such dutiable article." The respondent company had imported fifteen casks of stearine, which had been assessed by the collector of customs at duty amounting

to £92 1s. 6d. The respondent company claimed to recover this sum on the grounds that section 133 was invalid, because, *inter alia*, the words "the degree in which such unknown article approximates in its qualities to such dutiable articles" were so vague and obscure that they gave the Governor and collector power to impose duties on articles which the Legislature never had in contemplation. It was argued that this amounted to a delegation of authority to raise taxes, and though the Imperial Parliament might so delegate, it had not given such power to the New South Wales Legislature, and such delegation of taxing powers was invalid as being contrary to the New South Wales Constitution Act, 18 & 19 Vict. c. 54. The Constitution Act had provided that all money bills should originate in the Legislative Assembly of the colony, and this was an indication that the Imperial Legislature assumed that all legislation in the colony with respect to taxation should be by bill passed through both Houses.

The cases of *R. v. Burah* (1878), 3 A. C. 889, and *Hodge v. The Queen* (1884), 9 A. C. 117, were referred to and followed by the Privy Council, which reversed the decision of the Supreme Court of New South Wales and allowed the appeal with costs. In *R. v. Burah* the Privy Council had laid down the general law as regards delegation of powers by the Indian Legislature in these terms: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe these powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

The Privy Council held that similarly the New South Wales Legislature or any colonial Legislature was not a delegate of the Imperial Parliament. A colonial Legislature is restricted in the area of its powers, but within that area it is unrestricted.

In *Baxter v. Ah Wah* (1908), 8 C. L. R. 626, the Australian High Court gave a similar interpretation of the power of the Commonwealth Government to delegate authority to the Governor-General to enable him to prohibit by proclamation

certain classes of goods from being imported into the Commonwealth. Under the Customs Act, 1901, it was enacted that all goods the importation of which should be prohibited by proclamation should be prohibited imports. The Governor-General issued a proclamation prohibiting the importation of "opium suitable for smoking," and a notice of the prohibition was advertised in the "Commonwealth Gazette." Ah Wah, a Chinese, committed an offence against the proclamation and appealed on the grounds that the proclamation was invalid as taxation not voted by the Commonwealth Parliament, and that the principle "*delegatus non delegare potest*" applied. The High Court held that the proclamation was not a delegation of legislative power, but additional legislation and within the power conferred upon the Commonwealth Parliament under section 51, heads (i) and (ii) of the Constitution Act. The prohibition of importation was a legislative Act of Parliament itself, because the Customs Act merely gave the Governor a discretion to determine on what conditions prohibition to classes of goods other than those specified should apply.

**Nationality within the Empire.**—The idea of nationality in England was originally based on the doctrine of *ligeance*. Any person who was born within the *ligeance* of the King of England was a natural-born British subject, whilst on the other hand, no person was a natural-born British subject unless he was born within the *ligeance*. The idea of nationality was originally based on the doctrine of feudal service being due to the king in exchange for his protection as overlord. Nationality meant the existence of the status *protectio trahit subjectionem et subjectio protectionem*. Before the middle of the last century, the test of whether a person was of British nationality rested exclusively upon whether he was born within the British dominions. The nationality of his parents was of little importance. It was at that time doubtful whether even the sons of the reigning sovereign, if born outside England, would not be foreigners incapable of inheriting land, and for this special reason the statute 25 Edw. 3, stat. 2, was passed declaring that the King's sons had always been entitled to inherit

land in England ; but that with regard to the sons of natural-born Englishmen, if born abroad, they were only from that date to be English subjects and so capable of inheriting land. (See *R. v. Albany Street Police Station Superintendent*, [1915] 3 K. B., at p. 726.) On the other hand, all persons born in England were English. There were at common law a few exceptions to this rule, such as the children of ambassadors, reigning princes, alien enemies, etc., resident in this country at the time of birth, but such exceptions were of little practical importance. Subsequently their nationality was provided for by special statutes : 7 Anne, c. 5, the British Nationality Acts, 1730 and 1772, the Aliens Act, 1844, and Naturalization Act, 1870. Marriage until 1844 made no difference. If an alien woman married a British subject she did not become British by reason of her marriage ; and until 1870 a woman who was a British subject did not lose her British nationality by marrying an alien.

From the middle of last century onwards there has been a tendency to extend the privileges of British nationality to persons whose fathers are British. Under laws passed at various times, persons might claim to be British subjects although born outside the British dominions provided their fathers were born within the British dominions, or became British by naturalization. Whereas British nationality was originally something from which a subject could not free himself, the fact that British subjects might gain foreign nationality by naturalization under the laws of foreign States came to be recognised and upheld in peace time, but a British subject can never validly renounce his allegiance by naturalizing himself as the subject of a State with which Britain is at war, and the act of becoming naturalized under such circumstances is itself an act of treason and ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy (*R. v. Lynch*, [1903] 1 K. B., p. 444).

The definition of what constitutes British nationality is now contained in the British Nationality and Status of Aliens Acts, 1914, 1918 and 1922 (4 & 5 Geo. 5, c. 17; 8 & 9 Geo. 5, c. 38; and 12 & 13 Geo. 5, c. 44). The British Nationality and Status of Aliens Act, 1914, provides :—

Section 1—“(1) The following persons shall be deemed to be natural-born British subjects, namely :—

“(a) Any person born within His Majesty’s dominions, and allegiance, and

“(b) Any person born out of His Majesty’s dominions, whose father was at the time of that person’s birth a British subject, and who fulfils any of the following conditions, that is to say, if either—

“(i) his father was born within His Majesty’s allegiance; or

“(ii) his father was a person to whom a certificate of naturalization had been granted; or

“(iii) his father had become a British subject by reason of any annexation of territory; or

“(iv) his father was at the time of that person’s birth in the service of the Crown; or

“(v) his birth was registered at a British Consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after the first day of January, nineteen hundred and fifteen, who would have been a British subject born before that date, within twelve months after the first day of August, nineteen hundred and twenty-two; and

“(c) any person born on board a British ship whether in foreign territorial waters or not :

“Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty’s allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means His Majesty exercises jurisdiction over British subjects.

“Provided also that any person whose British nationality is conditional upon registration at a British consulate shall cease to be a British subject unless within one year after he attains the age of twenty-one or within such extended period as may be authorised in special cases by regulations made under this Act—

“(i) he asserts his British nationality by a declaration of

retention of British nationality registered in such a manner as may be prescribed by regulations made under this Act; and

“ (ii) if he is a subject or citizen of a foreign country under the law of which he can, at the moment of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly.”

(For a full treatment of the subject of nationality and naturalization the reader is referred to Dicey's *Conflict of Laws* (4th ed.), Chap. III, p. 156).

Under these rules and the rules of common law the “son of a Chinese subject born in Burma is as much a British subject as the son of English parents born in London.”

Before the Act of 1914 any person, though born out of the British dominions, was a natural-born subject if (a) his father or paternal grandfather was born in the British dominions, and (b) his father was at the time of the birth a natural-born British subject and not in the actual service of any foreign Prince or State in enmity with the Crown. Under the new rule the father must be born within the British dominions, and descent from a grandfather so born is no longer a ground for British nationality.

Since 1914, in order that a person may claim British nationality who is born outside the British dominions, his father must be a British subject at the time of birth, and either have been born within the British dominions, or have been naturalized, or become British by reason of annexation of territory, or been in the service of the Crown, or the father must have taken the trouble to retain the person's British nationality by registering the birth within a year and the person must have registered himself British on coming of age. Thus supposing a British-born subject A goes to a foreign country, his son B will be British by reason of A being British-born, although B is born outside the allegiance, but B's son C will not be British unless B takes the trouble to register the birth of C at a British consulate and C registers himself as British on attaining twenty-one. Before 1914, a protected territory was in this respect in the same position as

any other country outside the British dominions. That is to say, supposing A, a British-born subject, in 1870 went to a protected country, such as Egypt was before 1921, and had a son B born in Egypt in 1871, who had a son C born in Egypt in 1895, C would be British by reason of his grandfather A being British-born. C's son D, born in Egypt in 1917, would but for the passing of the Act of 1914 have been an alien. Section 1 of the Act of 1914 cited above provides that children born in a country where the Crown has extra-territorial jurisdiction are deemed to have been born within His Majesty's allegiance, so that D would now obtain British nationality in any event. In this way families who have been settled for generations in such places as Turkey, Egypt or Persia, or in protectorates such as Nigeria or Rhodesia, retain their nationality while so settled there. But supposing C is born in Paris, C will be a natural-born British subject, but his son D born in Egypt will not be British, because here the same rule applies as to all persons not born within the British dominions, that British nationality cannot be transmitted by inheritance for more than one generation, and a person not born within the British dominions may obtain British nationality only by descent.

**The nationality of persons resident in an annexed territory.—**  
The rule for fixing the nationality of persons living in a country which is annexed to the British dominions is stated by Dicey, *Conflict of Laws* (4th ed.), p. 178, thus :—

“ On the acquisition of territory by the Crown, whether by annexation or cession, all persons, national of the annexed or cessionary State, resident in the territory annexed or ceded, become British subjects unless other provision is made in the instrument of annexation or cession, or is enacted by the Crown.” In nearly all cases the treaty of cession or annexation provides minutely for the nationality of persons in any way connected with the territory annexed. Thus on the annexation of Cyprus on November 5, 1914, Ottoman subjects born in Cyprus and then resident therein became British subjects; on March 3, 1915, this was altered to include all Ottoman subjects resident on November 5, 1914, and on November 27, 1917, Ottoman subjects

ordinarily resident in Cyprus and actually present therein on November 5, 1914, were declared British subjects (*d*).

The children of persons who become British subjects by virtue of annexation of a territory in which they are resident, if they are resident in the annexed territory, obviously become British subjects, and also, it would seem, become British subjects if resident elsewhere. (See Dicey, *Conflict of Laws*, p. 185.)

For most purposes, persons who obtain British nationality by virtue of an annexation or cession are in the same position as persons who become naturalized by applying for a certificate, save that there is this obvious difference: that persons naturalized by virtue of annexation become British subjects automatically, even though they wish to retain their foreign allegiance, while persons who apply for a certificate of naturalization are obviously anxious to acquire British nationality.

**Naturalization.**—Naturalization in the United Kingdom is now governed by the British Nationality and Status of Aliens Act, 1914, section 2 of which provides that the Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose and satisfies the Secretary of State—

(a) that he has either resided in the British dominions for a period of not less than five years in the manner required by this rule, or been in the service of the Crown not less than five years within the last eight years before the application; and

(b) that he is of good character and has an adequate knowledge of the English language; and

(c) that he intends if his application is granted either to reside in the British dominions or to enter or continue in the service of the Crown.

And by the British Nationality and Status of Aliens Amendment Act, 1918 (8 & 9 Geo. 5, c. 38), s. 3, sub-s. 2: "No certificate of naturalization shall before the expiration of a period of ten years after the termination of the present war, [*i.e.*, August 21, 1921] be granted in the United Kingdom to any subject of a

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(*d*) *Gout v. Cimitian*, [1922] 1 A. C. 105; even a short residence at the material date is sufficient.

country which at the time of the passing of this Act [i.e., August 8, 1918] was at war with His Majesty, but this provision shall not apply to a person who—(a) has served in His Majesty's forces or in the forces of any of His Majesty's Allies or of any country acting in naval or military co-operation with His Majesty; or (b) is a member of a race or community known to be opposed to the enemy Governments; or (c) was at birth a British subject.”

Prior to 1914 naturalization under the Imperial Acts conferred British nationality on a person wherever resident, whether residing in the United Kingdom or within or without the British dominions, but since 1870 the Legislatures of the self-governing colonies have passed laws which conferred British nationality not only in the particular colony, but in many cases were intended to confer British nationality throughout the dominions and in the United Kingdom. To this extent such laws were invalid. For instance, in *The King v. Francis, Ex p. Markwald*, [1918] 1 K. B. 617; *Markwald v. Att.-Gen.*, [1920] 1 Ch. (C. A.) 348, Markwald, a natural-born German subject, left Germany in 1878 and went to Australia where he took the oath of allegiance to His Majesty, and was granted a certificate of naturalization under the naturalization laws of Australia. He later became resident in England and was charged and convicted in 1918 for that being an alien he had failed to furnish to the registration officer the particulars required by the Aliens Registration Consolidation Order, 1916. It was held that the taking of the oath of allegiance and the grant of a certificate of naturalization in Australia did not make a person a subject of the United Kingdom, and therefore that he was an alien in the United Kingdom, and the conviction was right. Section 26, sub-section 2 of the British Nationality and Status of Aliens Act, 1914, still allows the self-governing colonies to pass naturalization laws, but such colonial laws apply only within such dominions. The section provides “All laws, statutes, and ordinances made by the legislature of a British possession for imparting to any person any of the privileges of naturalization to be enjoyed by him within the limits of that possession, shall, within those limits, have the authority of

law." But self-governing colonies may confer naturalization upon persons which gives them British nationality outside the colonies if they choose to adopt the provisions of the Act of 1914, section 9 of which provides:—

"(1) This Part of this Act shall not, nor shall any certificate of naturalization granted hereunder, have effect within any of the Dominions specified in the First Schedule to this Act, unless the Legislature of that Dominion adopts this Part of this Act (i.e., Canada, Australia, including Papua and North Island, New Zealand, South Africa and Newfoundland).

"(2) Where the Legislature of any such Dominion has adopted this Part of this Act, the Government of the Dominion shall have like powers to make regulations with respect to certificates of naturalization and to oaths of allegiance as are conferred by this Act on the Secretary of State.

"(3) The Legislature of any such Dominion which adopts this Part of this Act may provide how and by what Department of the Government the powers conferred by this Part of this Act on the Government of a British Possession are to be exercised.

"(4) The Legislature of any such Dominion may at any time rescind the adoption of this Part of this Act, provided that no such revision shall prejudicially affect any legal rights existing at the time of such revision."

Until 1926 Canada, Australia, the Union of South Africa and Newfoundland had adopted the Imperial Act. New Zealand, by Act No. 46 of 1923, passed a naturalization Act of its own. The Imperial Act, as regards naturalization, does not therefore apply to New Zealand, but its other provisions do, and in so far as the New Zealand Act is in conflict with them the New Zealand Act is void.

The Imperial Conference of 1923 recommended the extension of the power to grant certificates of Imperial naturalization in respect of persons resident in mandated territories and protectorates. As has already been mentioned, p. 22, the Union of South Africa has naturalized the German population of South-West Africa by Act No. 30 of 1924, and for purposes of naturalization the mandated territory is treated as part of the Union.

The Merchant Shipping Acts.—Similar difficulties in regard to extra-territorial legislation over shipping have in the past been experienced as those arising out of the conflict of laws with regard to nationality and naturalization.

The first Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), legislated for British ships everywhere, but power was given to any British possession to repeal it in whole or in part as regards ships registered in the colony. In other words, a self-governing colony might relieve itself of the Imperial law by contracting out of it by its own Legislature passing a special Act.

Under the Merchant Shipping (Colonial) Act, 1869 (32 Vict. c. 11), s. 4, power was given to any colonial Legislature to pass Acts or make ordinances regulating the coasting trade of that British possession. The powers so conferred were, however, limited by certain safeguards :—

“ (1) The Act or Ordinance shall contain a suspending clause providing that such Act or Ordinance shall not come into operation until Her Majesty’s pleasure thereon has been publicly signified in the British possession in which it has been passed.

“ (2) The Act or Ordinance shall treat all British ships (including the ships of any British possession) in exactly the same manner as ships of the British possession in which it is made.

“ (3) Where by treaty made before the passing of this Act, Her Majesty has agreed to grant to any ships of any foreign State any rights or privileges in respect of the coasting trade of any British possession, such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already or may hereafter agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding.”

These rules were again altered by section 735 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which provides :—

Section 735.—(1) “ The legislature of any British possession may by any Act or Ordinance, confirmed by Her Majesty in Council, repeal, wholly, or in part, any provisions of this Act (other than those of the Third Part thereof which relate to emigrant ships), relating to ships registered in that possession; but any such Act or Ordinance shall not take effect until the

approval of Her Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the Act or Ordinance for the purpose.

“(2) Where any Act or Ordinance of the legislature of a British possession has been repealed in whole or in part as respects that possession any provision of the Acts repealed by this Act, that Act or Ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provision repealed by this Act.”

**Copyright.**—The Copyright Act of 1842 (5 & 6 Vict. c. 45) gave a British author publishing a work in the United Kingdom copyright throughout the Empire but not conversely. It did not protect throughout the Empire books published in a colony. On the other hand, residence in the United Kingdom was not necessary in order to qualify an author for registration of a copyright. This was held to be so in the case of *Routledge v. Low and Cummins* (1868), 3 H. L. 100. The facts in that case were that Maria Cummins, an American lady, wrote a novel entitled “Haunted Hearts,” which she transmitted to the publishing firm of Sampson Low for publication. In order to qualify for residence within the British Empire, she was advised to go to Canada meantime and she went and resided at Montreal. The copyright in the novel was assigned to Low, and the work and assignment registered at Stationers’ Hall. The novel was subsequently sold by Low as a two-volume book at 16s. The firm of Routledge, in disregard of the claim of copyright put forward by Low and the authoress, published a 2s. edition. Routledge denied that “Low could have copyright in a work written by an alien, between whose country and our own no law of international copyright subsists.” Low claimed an injunction in Chancery to restrain the publication and sale of further copies by Routledge. The law of Canada gave no copyright in England where the book was published, and therefore the question arose whether residence in a British possession, but not in the United Kingdom, was a sufficient qualification for Imperial copyright. It was held that the protection of the statute was given to every author who first publishes a work in the United Kingdom, wheresoever he may be then resident.

The rule that registration under a colonial copyright law did not confer copyright throughout the rest of the Empire was rectified by the International Copyright Act, 1886 (49 & 50 Vict. c. 33), which provides :—

Section 8.—“(1) The Copyright Acts shall, subject to the provisions of this Act, apply to a literary or artistic work first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom :

“ Provided that—

- “(a) the enactments respecting the registry of the copyright in such work shall not apply if the law of such possession provides for the registration of such copyright; and
- “(b) where such work is a book the delivery to any persons or body of persons of a copy of any such work shall not be required.

“(2) Where a register of copyright in books is kept under the authority of the Government of a British possession, an extract from that register purporting to be certified as a true copy by the officer keeping it, and authenticated by the public seal of the British possession, or by the official seal or the signature of the Governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the Government of a British possession, shall be admissible in evidence of the contents of that register, and all Courts shall take judicial notice of every such seal and signature, and shall admit in evidence, without further proof, all documents authenticated by it.

“(3) Where before the passing of this Act an Act or Ordinance has been passed in any British possession respecting copyright in any literary or artistic works, Her Majesty in Council may make an Order modifying the Copyright Acts and this Act, so far as they apply to such British possession, and to literary and artistic works first produced therein, in such manner as to Her Majesty in Council seems expedient.

“(4) Nothing in the Copyright Acts or in this Act shall prevent the passing in a British possession of any Act or

ordinance respecting the copyright within the limits of such possession of works first produced in that possession.

“ 9.—Where it appears to Her Majesty expedient that an Order in Council under the International Copyright Acts made after the passing of this Act as respects any foreign country, should not apply to any British possession, it shall be lawful for Her Majesty by the same or any other Order in Council to declare that such Order and International Copyright Acts and this Act shall not, and the same shall not, apply to such British possession except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order; and the expressions in the said Acts and this Act shall apply to every British possession as if it were part of the United Kingdom.”

The Imperial Copyright Act of 1911 (1 & 2 Geo. 5, c. 46) enables a colony to repeal the Imperial Act of 1842 and so take away within the colony copyright of publications protected by the Imperial Act. A colony may, however, adopt the Imperial Act of 1911, in which case the copyright obtained in the colony extends to the United Kingdom and such colonies as have adopted the 1911 Imperial Act. Section 25 of the Act of 1911 provides :—

“ (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty’s dominions : Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

“ (2) If the Secretary of State certifies by notice published in the *London Gazette* that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty’s dominions to which this Act extends, enjoy within the dominion rights substantially identical

with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act."

Section 27.—“The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

“28.—His Majesty may, by Order in Council, extend this Act to any territories under his protection, and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty’s dominions to which this Act extends.”

Section 37, sub-section 2 (b) and (d) provides that the Act shall come into operation in a self-governing dominion to which the Act extends, at such date as may be fixed by the Legislature of that dominion; and in any other British possession to which the Act extends, on the proclamation thereof within the possession by the Governor.

## CHAPTER IV.

THE APPELLATE JURISDICTION OF THE PRIVY COUNCIL—  
INTERPRETATION OF COLONIAL LAWS IN ENGLISH  
COURTS—ENFORCEMENT OF COLONIAL PAYMENTS.

Before the loss of the Duchy of Normandy and the other French possessions, the King frequently heard appeals from them personally with his Council. After their loss the Channel Islands, which originally formed part of the Duchy of Normandy, were kept within the jurisdiction of the King and Council. An Order in Council of Henry VII's reign directed that appeals from these islands should go not to the Court of King's Bench but to the King and Council, and special orders were made relating to appeals from Jersey in 1572 and Guernsey in 1580. In *Christian v. Corren* (1716), 1 P. Wms. 329, by analogy the jurisdiction was extended to the Isle of Man, and in 1724 (*Fryer v. Bernard*, 2 P. Wms. 262) it was definitely laid down that all appeals from the plantations should be heard by the King in Council (a). Under the Foreign Jurisdiction Act, 1890, jurisdiction has by Order in Council been extended to many protectorates and foreign countries. Since the creation of mandated territories there has been a right of appeal from the Supreme Court of Palestine: see *District Governor of Jerusalem-Jaffa District v. Suleiman Murra*, 42 T. L. R. 299, p. 17.

The present jurisdiction of the Privy Council rests almost entirely upon statutes. In 1832, by 2 & 3 Will. 4, c. 92, the Privy Council was made the final Court of Appeal from the Court of Admiralty and from the Vice-Admiralty Courts in the colonies, and also in ecclesiastical suits.

Although in theory the whole Council was entitled to sit, in

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(a) For history of jurisdiction see Holdsworth, History of English Law, vol. i, pp. 516—7 and 522—5. The Practice of the Privy Council in Judicial Matters (2nd ed.), Norman Bentwich. See also The Rhodes Lectures of Prof. J. R. Morgan, K.C., on "The Judicial Committee," reported in Law Journal, March 12, 1927, *et seq.*

practice the duty fell to a small committee consisting of the chief legal authorities, the Bishop of London, one or other of the Secretaries of State and other members as were interested.

By an Act of 1833 (3 & 4 Will. 4, c. 41), s. 2, in place of the whole body of the Privy Council a special committee was set up to hear all appeals either in virtue of the Act itself, or by any other Acts or by custom hitherto heard by the whole Council.

The Act provided that the committee was to consist of the Lord Chancellor, former Lord Chancellors, and other members who had held high judicial office, and in ecclesiastical cases every archbishop or bishop being a privy councillor. The bishops and archbishops ceased to be members of the committee under the Appellate Jurisdiction Act, 1876, ss. 14, 24; but may sit as assessors in ecclesiastical cases.

Under section 4 of the Judicial Committee Act of 1833 the Crown may, as was the older practice, especially refer to the Privy Council "any such other matters whatsoever as His Majesty shall think fit." Under this statutory power many miscellaneous questions have been so referred—a dispute between the Legislative Assembly of Queensland and its Legislative Council, the validity of certain Orders in Council relating to Jersey (*In the matter of the States of Jersey* (1858), 8 S. T. (n.s.) 285); a dispute between two colonial bishops (*Re Bishop of Natal* (1864), 3 Moo. P. C. (n.s.) 116, see p. 31); a dispute between the Legislative Council of Southern Rhodesia and the British South Africa Co. (*Re Southern Rhodesia*, [1919] A. C. 211, see p. 5); a dispute whether the Imperial Government has the right to appoint a representative to a commission to fix the boundary between Northern Ireland and the Irish Free State (see pp. 98, 214).

Thus, in the recent case of *In the matter of the Labrador Peninsula* (Law Journal, March 5, 1927) the Judicial Committee were set the following question: "What is the location and definition of the boundary as between Canada and Newfoundland under the statutes, orders and proclamations?" Here the dispute was between the oldest colony and a self-governing dominion concerning territory covering 120,000 square miles,

and including forests worth 50 million pounds, besides mines and minerals of untold value. By the consent of both parties the matter was referred to the adjudication of the Council as a matter of pure interpretation.

Until 1844 it was not possible to appeal in cases which had not been taken to the Supreme Court of the colony.

The Judicial Committee Act of 1844 (7 & 8 Vict. c. 69) recites : The Judicial Committee, acting under the authority of the said Acts (Act of 1833 and an amending Act) hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business and also to extend its jurisdiction and powers ”; and it provides that the Judicial Committee may admit appeals from any Court of any colony although such Court was not a Court of error or appeal. In this way a party to suit may go past the Supreme Court of Canada direct to the Privy Council, from the Supreme Court of Alberta, or direct from a Police Court in Alberta. But all such appeals from inferior Courts must always be by special leave of the Judicial Committee of the Privy Council itself, and the privilege is not readily granted.

By the Judicial Committee Act, 1871 (34 & 35 Vict. c. 91), the Crown was empowered to appoint four paid members of the Judicial Committee from among the members of the Superior Courts of the Chief Justices of the High Courts in Bengal, Madras, or Bombay. Until that time the Committee contained no members specially qualified to judge cases involving the application of native laws and customs.

The scheme outlined in the Judicature Act of 1873 intended to abolish the appellate jurisdiction of the House of Lords, but the Act was put into operation in 1875 without these clauses, and the Judicial Committee of the House of Lords was remodelled by the Appellate Jurisdiction Act, 1876, which, with the exception of the Indian Judges who might be appointed to the Privy Council under the Judicial Committee Act, 1871, made the personnel of the House of Lords practically identical with that of the Judicial Committee of the Privy Council.

The Judicial Committee Amendment Act, 1895 (58 & 59 Vict.

c. 44) enabled Judges of the Supreme Courts of the Dominions to sit as members of the Judicial Committee, provided they did not exceed five in number. By section 3 of the Appellate Jurisdiction Act, 1918 (3 & 4 Geo. 5, c. 21), this number was increased to seven. By section 1 of the Appellate Jurisdiction Act, 1908 (8 Edw. 7, c. 51): "His Majesty may, if he thinks fit, authorise any person who is or has been a Judge of the Court from which the appeal is made, or a Judge of a Court to which an appeal lies from the Court from which the appeal is made, and whose services are for the time being available, to attend as an assessor of the Judicial Committee of the Privy Council on the hearing of the appeal."

The provision applies only to certain British possessions set out in the Schedule and added to by Order in Council, but includes British India. No provision was made in the Acts of 1895 or 1908 for the payment of colonial Judges, who therefore in practice only sit occasionally when they are in England.

By the Appellate Jurisdiction Act, 1915 (5 & 6 Geo. 5, c. 92), power was given by Order in Council to constitute divisional courts and divisional sittings of the Privy Council.

The right of appeal from the judgment of a colonial Court to the Privy Council depends in civil cases (a) upon the amount involved and provisions made in the constitution of the colony; (b) in criminal cases, special leave must be obtained.

**Civil cases. Large amounts (not constitutional issues).**—Before 1908 special Orders in Council were issued to apply to each particular colony. Such Orders in Council had been necessary for each colony because an appeal of right lay from the Supreme Court of a colony, unless it was the subject of a special grant to the colony by an Order in Council saying that the Supreme Court may allow appeals to go to the Privy Council.

Section 5 of the Appellate Jurisdiction Act, 1908, provided that "His Majesty may from time to time by Order in Council make a general Order directing that all appeals shall be referred to the Judicial Committee of the Privy Council until the Order is rescinded, and section nine of the Judicial Committee Act, 1844, shall have effect as if any such general Order for the time

being in force were substituted in the first proviso to that section for the annual Order therein referred to, and the time for which the Order remains in force were substituted for the twelve months next after the making of the general Order.” Under this section Orders in Council have been issued which provide that there shall be, as a matter of right, an appeal from any final judgment of a colonial Court, where the matter in dispute amounts to a certain sum or where the appeal involves some claim respecting property or some other civil right amounting to a certain sum (b).

**Civil cases. Lesser amounts (not constitutional issues).—** Before 1908 where the amount in dispute was less than a particular amount set out in the Order in Council applying to the particular colony, there was no right of appeal. The appellant had first to obtain “special leave” from the Privy Council. Under the General Orders in Council of 1908 it is not necessary to obtain this special leave as a matter of course, but the Colonial Court may at its discretion grant leave to appeal from any other judgment; that is to say, although the amount does not fall within the monetary limits, if the High Court considers that the question involved is one which by reason of its public or legal importance ought to be submitted to the Judicial Committee of the Privy Council, it can itself grant leave to appeal. Rule 2 of the Order in Council of 1908 provides “In future all appeals to the Privy Council shall be brought either in pursuance of leave obtained from the Court appealed from, or in pursuance of special leave granted by His Majesty in Council.”

Even if the amount falls below the monetary limit fixed and leave has not been obtained from the Court appealed from by the Order in Council of 1908, the Judicial Committee of the Privy Council can still grant special leave.

**Criminal cases.—**In all criminal cases there is an appeal but not as of right. Procedure is by way of a petition for leave to

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(b) The amount is fixed by Orders in Council issued in respect of various colonies. It varies from £300 to £2,000, but £500 is the usual amount and the appellant has to give security for costs up to £500.

appeal, and since 1908 the Judicial Committee has been reluctant to grant special leave except in very strong cases.

In *Falkland Islands v. The Queen*, 1 Moore, P. C. (N.S.) 299, at p. 312, it was said : "It may be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all colonial Courts, whether the proceedings be civil or criminal in character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board, similar to the present, have been attended by success."

Generally speaking the Privy Council will not review criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. For instance, in *The Queen v. Bertrand* (1867), 1 P. C. 520, the prisoner had been tried for murder in the Supreme Court of New South Wales and the jury not agreeing, a fresh trial had been ordered. On the second trial, at the same sitting before another jury, some of the witnesses having been resworn, the evidence given by them at the first trial was read over to them from the Judge's note, liberty being given both to the prosecution and to the prisoner to examine and cross-examine. On appeal it was held that the course adopted by the Judge was irregular and could not be cured even by the consent of the prisoner, and secondly, according to the English law prevailing in New South Wales, the Supreme Court had no power to grant a new trial in a case of felony.

In *Re Dillet* (1887), 12 A. C. 459, a barrister (who was also a solicitor) had appeared drunk in the Court of the Judge of British Honduras, and had threatened to whip the Attorney-General of the colony. The Judge ordered affidavits to be prepared in proceedings to strike the solicitor off the rolls, and in answer to the affidavits of the witnesses, the appellant swore an affidavit that he was not drunk. He was then charged with perjury in making the affidavit, and the charge of perjury was

tried by the same Judge who had ordered the proceedings to be taken for having the appellant struck off the rolls. At the trial the Judge directed the jury in a manner improper and grievously unjust to the appellant, who was convicted and served six months' imprisonment and was struck off the rolls. The Privy Council held that a conviction obtained by such unworthy means could not be permitted to stand, and reversed the order striking the appellant off the rolls (c).

In *Nadan v. The King*, [1926] A. C. 482, the appellant was convicted by a police magistrate in Alberta of driving a car containing intoxicating liquor not sealed, and was fined \$200 and \$7.50 costs on the first offence, and \$500 and \$20 on the second offence, and the motor car was forfeited.

Section 1025 of the Criminal Code of Canada provides:—  
“ Notwithstanding any Royal Prerogative or anything contained in the Interpretation Act, or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.”

On appeal the Privy Council held that the above section 1025, so far as it applies to appeals which are brought to the Privy Council by special leave granted under the Prerogative, is not authorised by section 91 of the British North America Act, 1867, and is repugnant to the Judicial Committee Acts, 1833 and 1844, and is therefore void and inoperative by virtue of section 2 of the Colonial Laws Validity Act, 1865. In *Clifford v. King* (1914), 83 L. J. P. C. 152, it was decided that the Privy Council was not a Court of Criminal Appeal with powers to reopen evidence and questions of procedure; and in *Balmukand v. King-Emperor*, [1915] A. C. 629, that the Privy Council, not being a Court of Criminal Appeal, could not postpone the

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(c) *Chang Hang Kiu v. Piggott*, [1909] A. C. 312, successful appeal against conviction of perjury in Hong Kong. See also *Lanier v. R.*, [1914] A. C. 221, successful appeal against a conviction under the Penal Code of Seychelles: *Ibrahim v. R.*, [1914] A. C. 599, unsuccessful appeal against sentence of death, by a soldier made a British subject by enlistment in an Indian regiment; *Arnold v. King-Emperor*, [1914] A. C. 644, unsuccessful appeal against conviction of criminal libel in Burma.

carrying out of a sentence of death although it was likely to be carried out long before an appeal against sentence could be heard.

**Constitutional issues.**—The right of appeal in civil cases provided for by the Orders in Council issued under the Act of 1908 do not apply to a self-governing colony where the Constitution provides that there shall be no appeal, save by special leave, or the Constitution makes it possible for the colonial Legislature to pass legislation limiting the right of appeal. There is no anomaly in such a situation. It is merely a case of an Act of the Imperial Parliament or a colonial Act made in pursuance of an Act of the Imperial Parliament limiting the application of an Imperial Order in Council.

**South Africa.**—The South Africa Act, 1909 (9 Edw. 7, c. 9), s. 106, provides : “ There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council, but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty’s pleasure : Provided that nothing in this section shall affect any right of appeal to His Majesty in Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890.” In *British South Africa Co. v. Lennon* (1915), 85 L. J. P. C. 111, the Supreme Court of South Africa gave special leave. In *Whittaker v. Durban Corporation* (1920), 90 L. J. P. C. 119, special leave was refused on a local question, though of great importance.

**Ireland.**—The Irish Free State Constitution Act, 1922, Art. 66 (see p. 226), abolishes appeal as of right, and the decision of the Supreme Court is to be final, but the Privy Council may still grant special leave to appeal.

**Australia.**—Australia Constitution Act, 1900, s. 74, provides: “No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, however arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth, and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

“The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

“Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty’s pleasure.”

Under the Judicial Committee Act, 1844, the Privy Council might give leave to appeal from a State Court direct (see p. 83), while section 74 (*cit. supra*) applied only to the High Court. Until 1907 the Privy Council and the High Court had thus a concurrent jurisdiction over appeals from the State Courts, and in some instances, as in *Deakin v. Webb*, 1 C. L. R. 585, and *Webb v. Outram*, L. R. [1907] A. C. 81, gave directly opposite decisions (see pp. 166, 189). The concurrent jurisdiction has now been abolished by the Commonwealth Act of 1907, No. 8, in cases in which constitutional rights and powers of the Commonwealth, *inter se*, are involved, and in such cases there is no appeal save by the certificate of the High Court (*d*). On questions involving no constitutional issue there is still a right

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(d) In *Att.-Gen. Australia v. Colonial Sugar Refining Co.*, [1914] A. C. 237, the Australian High Court certified an appeal and the case came to the Privy Council. In *Jones v. Att.-Gen. Australia*, [1917] A. C. 528, and *Minister for Trading Concerns v. Amalgamated Society of Engineers*, [1923] A. C. 170, the High Court refused to certify and the Privy Council held that leave could not be granted.

of appeal from the State Courts direct to the Privy Council provided special leave is obtained.

**Canada.**—The British North America Act was silent on the point, but section 101 enabled the Parliament of Canada to provide for the organisation of a general Court of Appeal for Canada. The Supreme Court was set up in 1875, which has both a civil and criminal appellate jurisdiction throughout the dominion. Its judgment is final “ saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative.” Under this Act, from any of the lesser Courts (whether the question at issue involves a constitutional interpretation or not) there is a right of appeal direct to the Privy Council, but if appellant decides to appeal to the Supreme Court he cannot thereafter appeal unless he obtains special leave from the Privy Council, which will not be granted save in a special case. In some cases the Privy Council has intimated that the petitioner should first appeal to the Supreme Court and then if necessary to the Privy Council.

At one time the right of appeal to the Privy Council from the Courts of the Provinces was looked upon as a constitutional safeguard against the encroachment of the Federal authority upon the right of the French inhabitants to retain their language and religion. Such questions have lost their former political significance, and there is a movement in Canada to abolish the right of appeal altogether, or limit it in constitutional questions as has been done in Australia.

At present, however, in cases of all kinds, including those affecting the Constitution of Canada and the Provinces, appeal can still be taken from the Court of Appeal of a Province direct to the Privy Council, provided the Privy Council gives special leave. In the past the Privy Council has purposely avoided laying down any specific rules upon which such special leave should be given, but the view taken now is that it is better to take a case affecting the Canadian Constitution to the Supreme Court of Canada first, so that the Privy Council may have the advantage of its opinion. Thus, in *Re the Initiative and Referendum Act*, [1919] A. C. 935, appeal was taken from the

Court of Appeal of Manitoba direct to the Privy Council. Viscount Haldane (at p. 939) there said: "It would have been a convenient course if, before bringing these questions before the Sovereign in Council, the authorities of the Province had seen their way in the first place to submit them for the opinion of the Supreme Court of Canada. It is desirable that topics affecting the Constitution of Canada should come before that Court before being brought to London for argument. However, the parties appear to have concurred in asking that special leave for a direct appeal should be granted. Their Lordships desire to observe that it is by no means a matter of course that such leave should be given, for they attach much importance, not only to the position which belongs to the Supreme Court under the Constitution of Canada, but to the value, in the decision of important points such as those before them, of the experience and learning of the Judges of that Court. However, the Attorney-General of the Province has succeeded in obtaining special leave to bring the case directly before the Judicial Committee, and their Lordships will therefore deal with it. They will only observe further at this stage that they have derived much assistance from the judgments delivered by the members of the Court of Appeal of Manitoba."

**Interpretation of colonial laws in English Courts (e).**— Generally speaking, the existence and meaning of a colonial law is established in the English Courts by calling expert witnesses who are usually barristers who have practised in the particular colony and are conversant with its laws.

Judges may, however, waive proof by experts where it is obviously unnecessary, as, for instance, on points which must be formally proved, but need no really expert testimony, which may be difficult or costly to procure. Copies of colonial Acts may, for instance, be produced and their authenticity established by the Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16), without the aid of expert witnesses.

By the British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63) a Court in any part of the British dominions may send

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(e) See Dicey, *Conflict of Laws* (4th ed.), p. 808.

a case to a Court in any other part in order to ascertain its view of the law applicable in the case sent. Under this Act such evidence was formerly submitted to the jury as evidence of the existence of such law, but was not binding on the English Court.

Under section 15 of the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), it is provided that any question as to the effect of such evidence shall, instead of being submitted to the jury, be decided by the Judge alone. This apparently makes the opinion of the Court to which the point is referred binding on the English Court from which the case is sent.

**Enforcement of colonial judgments.**—Judgments of colonial Courts were formerly treated in the English Courts as the judgments of entirely foreign Courts. The result was that there was no mode of enforcing directly by execution a colonial judgment in England any more than a judgment obtained in the Courts of a foreign country. A foreign judgment *in personam* may, after proof of its existence, be enforced by taking action in the High Court for the amount due under it, if the judgment is for a debt or a definite sum of money, and is final and conclusive, but not otherwise.

Under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), and the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), it was made possible in the case of Scottish and Irish judgments for a judgment creditor to obtain payment by the simpler process of registering a certificate of the judgment instead of having to bring a new action to enforce it. The Judgments Extension Act, 1868, has never applied to the Channel Islands or the Isle of Man. Under the Government of Ireland Act, 1920, the Judgments Extension Act, 1868, was extended to both Northern and Southern Ireland, *inter se*, but the repeal of the Government of Ireland Act, 1920, as regards what is now the Irish Free State, means that the Act applies only to Northern Ireland, and the judgment of the Courts of the Irish Free State are in the same position as the judgments of colonial Courts.

Under the Administration of Justice Act, 1920, Part II (10 & 11 Geo. 5, c. 81), provision is now made for registering within twelve months the judgments of colonial Courts in the High

Court of England or in the Court of Session in Scotland, and if it is thought just and convenient that the judgment should be enforced a judgment "may be so registered and enforced as if it were a judgment of the Court in which it is registered." By section 13 of the Administration of Justice Act, 1920, the Act may be extended by Order in Council to apply to judgments obtained in the Courts of Protectorates. Colonial judgments enforced in this way under the Administration of Justice Act, 1920, are, however, not completely assimilated to Scottish and Irish judgments enforced under the Judgments Extension Act, 1868, because the registration of a colonial judgment rests upon the discretion of the High Court, and under section 11 of the Administration of Justice Act, 1920, the High Court may make rules regulating the practice and procedure in respect to proceedings of any kind under the Act. Section 14 provides: " (1) Where His Majesty is satisfied that reciprocal provisions have been made by the Legislature of any part of His Majesty's dominions outside the United Kingdom for the enforcement within that part of His dominions of judgments obtained in the High Court of England, the Court of Session in Scotland, and the High Court in Ireland, His Majesty may by Order in Council declare that this Part of this Act shall extend to that part of His dominions, and on any such Order being made this Part of this Act shall extend accordingly. •

" (2) An Order in Council under this section may be varied or revoked by a subsequent Order."

The Act has so far been extended to New Zealand, Newfoundland, Southern Rhodesia, New South Wales, South Australia, Western Australia, the Irish Free State, and the majority of the Crown Colonies.

Before a foreign judgment can be enforced in this country, it must be proved that the judgment debtor was within the jurisdiction of the foreign Court; that he had agreed to submit himself to the jurisdiction of the foreign Court, or had resided in the foreign country, or was domiciled there, or a subject of the foreign country. In *Gavin Gibson & Co. v. Gibson*, [1913] 3 K. B. 379, the defendant was born in the Colony of Victoria and resided there for twenty-six years, until 1890, when he came to

live in England. Since 1890 he had visited Victoria on several occasions, the last being in 1906. In 1911 the plaintiffs issued a writ against him in the Supreme Court of Victoria to recover a sum of money, £2,755 13s. 5d., as being due on accounts stated. The writ was served on the defendant in England, but he did not appear, and the plaintiffs signed judgment in the Victoria Court against him in default of appearance. In an action in England upon the judgment the plaintiffs contended that the defendant, although he was not resident in Victoria or domiciled there when judgment was given, was within the jurisdiction as being a "subject" of the State of Victoria. It was held that the defendant was a "subject of the King" and not a subject of Victoria, so as to render the judgment recovered against him in his absence binding upon him in this country, and that therefore the judgment was not enforceable here.

**Probate: Colonial Probates Act, 1892 (55 Vict. c. 6).**—Many of the self-governing colonies acknowledge the validity of probates granted by the Courts of the United Kingdom. Section 1 of the Colonial Probates Act, 1892, provides that where the Legislature of an English possession has made adequate provision for the recognition of probates and letters of administration granted by the Courts of the United Kingdom, Orders in Council may be made to apply to that possession, and thereupon the Act is made to apply accordingly. Under section 2 of the Act there is provided a reciprocal arrangement under which probate or letters of administration granted in a British possession to which the Act applies may be sealed in a Court of the United Kingdom and be of the like force and have the same operation in the United Kingdom as if granted by that Court, and section 3 applies the Act to the British Courts in foreign countries, *i.e.*, in protectorates.

## CHAPTER V.

## DOMINIONS AND THE TREATY MAKING POWER (a): THE INTERNATIONAL STATUS OF DOMINIONS — PRINCIPLES OBSERVED IN THE NEGOTIATION OF TREATIES — THE IMPERIAL CONFERENCE AND COMMITTEE FOR IMPERIAL DEFENCE.

The Imperial Parliament has still undoubted power to make treaties with foreign States which are binding on the colonies, whereas a colony has no power to make a treaty with an independent Power which is binding on itself, much less on other dominions. Colonial Legislatures are not to this extent sovereign law-making bodies.

At the beginning of the last century the Imperial Parliament freely exercised its right of making political treaties with foreign States without consulting colonial Legislatures. With the growth of responsible government in the dominions it became the practice in the negotiation of commercial treaties to consult the wishes of the colonial Legislatures. Thus in 1854 Lord Elgin negotiated a reciprocity treaty with the United States which was made binding on Canada after consultation with the Government of Lower Canada. In 1871 Sir John Macdonald represented Canada in the negotiation of the Political Treaty of Washington with the United States. About that time the attitude of the United States was extremely hostile to England as a result of the Alabama incidents, and her hostility had to some extent brought about the consolidation of Canada under a federal form of government. Although the Treaty was signed by the British Ambassador at Washington, it represented in reality a treaty negotiated between Canada and the United States, settling in accordance with the views of the Canadian Government several long-standing grounds of dispute as, for example, the fishing rights on the Labrador coast which concerned Canada alone.

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(a) See article "The International Status of the Dominions" by Prof. Berriedale Keith, *Journal of Comparative Legislation*, 3rd series, vol. ii, 1923, p. 161.

By the end of the last century the principle had been accepted both by the Imperial and Dominion Governments that in the negotiation of commercial treaties a self-governing colony was not to be included unless it definitely assented, and, on the other hand, if a self-governing Dominion wished to conclude a commercial treaty between itself and a foreign Power, the Imperial Government was to instruct its ambassador or other diplomatic agent to carry on negotiations with the foreign Power towards that end, and to sign the treaty after it was made. In 1893 the whole of the negotiations between France and Canada, leading to the commercial treaty of that year, were carried out by Sir C. Tupper, the Canadian High Commissioner in London. Foreign Powers, however, showed no readiness to accept as binding treaties which had not been ratified by the Imperial Plenipotentiaries and Parliament, and in 1895 the Imperial Government laid down a rule that since a dominion has no power to make an independent treaty, all treaties must be negotiated by an Imperial Plenipotentiary at the Court of the foreign Power, though the plenipotentiary may, where a dominion is specially affected by the treaty, be aided by the advice of a representative delegated by the Dominion Government. No treaty was to be approved which granted the most favoured nation treatment to a foreign Power, and did not extend the same conditions to the whole of the British possessions, and no condition was to be accepted from a foreign Government which would prejudice the interest of other parts of the Empire.

This continued to be the procedure whenever a formal treaty was made. In 1911 the Canadian Government made an informal agreement with the United States which was not to be considered as a treaty, but which was to be put into effect by an Act of the American Congress and an Act of the Canadian Parliament. The view was taken by many Canadian electors that the negotiation of a commercial treaty in this way, without the intervention of the Imperial diplomatic representatives, was an effort on the part of the American Government to detach the Dominion from the Empire and place her under the political dominance of the United States. The agreement was strenuously opposed

in the Canadian Parliament, and on its dissolution the Liberal Party was defeated at the polls, and the agreement subsequently dropped.

Although in International Law the Imperial Parliament may still make a political treaty without consulting the Legislatures of the self-governing Dominions, in practice it is usual to avoid giving offence to national susceptibilities, and the Imperial Parliament always consults the wishes of any dominion which may be affected. This new departure began with the ratification of the Anglo-Japanese Treaty of 1911, which, although operative as regards the Imperial Government, did not come into force in Canada until the Dominion Government gave its consent. The Dominion Government assented freely, but British Columbia refused assent, and the treaty did not come into force in British Columbia.

Upon the representations of Sir R. Borden and General Smuts that the dominions would not be expected to accept a position of inferiority to the lesser Powers which had done far less to win the war, the dominions were separately represented at the Peace Conference in 1919. The Treaty of Versailles, 1919, was the first instance of a treaty negotiated, signed, and subsequently ratified by the self-governing dominions jointly with Great Britain, instead as hitherto by Great Britain alone. A "British Delegation" was set up consisting of Imperial Ministers and representatives of dominions, and the treaty was eventually signed by all the Prime Ministers and the Secretary of State for India. The procedure was similar in the ratification of the Washington Naval Conference in 1922.

In March, 1923, for the first time, a treaty applicable to a particular dominion was negotiated entirely by a dominion and signed by its representatives. The Halibut Treaty of 1923 between Canada and the United States, regulating the conduct of the halibut fisheries in the Northern Pacific, was negotiated by the Canadian Government and signed exclusively by the Canadian Minister of Marine and Fisheries, who had been granted powers by His Majesty to sign. In previous treaties between the U.S.A. and Canada the British Ambassador at Washington had always acted with the Canadian representative. The

omission of the signature of the British Ambassador makes no difference to the character of the treaty, which was regarded by the American Senate as signed by the Canadian Minister under powers granted by the British Crown, and therefore binding on all British subjects.

In 1923 Canada, not having been separately represented in the negotiations relating to the Treaty of Lausanne, did not consent to sign until it was pointed out that if Canada did not sign a state of war would still exist between Canada and Turkey.

As a result of the dominions being separately represented in the negotiations relating to the Peace of Versailles, the self-governing dominions have a special status in the Assembly of the League of Nations, where they are also separately represented (b). On the Council of the League, the British Empire, like other States, has only one vote. The refusal of the United States to join the League was largely its opposition to this privileged position of the self-governing British dominions, for if the United States came in, they would have only one vote in the Assembly, though on the Council of the League the United States would be on equality with the British Empire.

The separate status relates only to the subjects of the League, and the Imperial Parliament has refused to allow the boundary dispute between Northern Ireland and the Free State to be made a subject of intervention by the League as was suggested by the Government of the Irish Free State.

It has been recognised that Canada is entitled to distinct representation in the diplomatic relations of the Empire with the United States because, owing to her proximity to the United States, she is more likely to be affected by any decisions come to.

With the consent and recognition of the Imperial Government, Canada has had a plenipotentiary appointed to Washington, and the principles involved in the appointment were approved by the other Dominions and the Imperial Government at the Imperial Conference, 1926.

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(b) At the Aerial Navigation Convention, 1919, it was agreed that on the International Commission for Air Navigation the Dominions should be separately represented but as regards votes the Dominions, India and Great Britain are grouped together as one entity.

If war is declared upon the United Kingdom or acts of hostility are committed against the jurisdiction of the Crown, or any portion of the territory of the British Empire is invaded, all other portions of the British Empire immediately find themselves at war with the Power concerned. What active assistance a particular self-governing dominion will be prepared to render to the Mother Country will depend entirely upon what provision is made by its Legislature for voting supplies, etc. The Irish Free State Constitution Act, 1922, Art. 49, provides : " Save in the case of actual invasion, the Irish Free State (Saorstat Eireann) shall not be committed to active participation in any war without the assent of the Oireachtas." In the event of Great Britain finding herself at war with another country, Ireland might refuse to render assistance, but Ireland would, nevertheless, be at war the same as all other dominions, and it would be *ultra vires* the Oireachtas to pass any Act declaring Ireland neutral.

Principles observed in the negotiation of treaties.—At the Imperial Conference, 1923, a resolution was passed as follows :

" (a) It is desirable that no treaty should be negotiated by any of the Governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demand, on the Empire as a whole.

" (b) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other Governments of the Empire likely to be interested are informed, so that, if any such Government considers that its interests would be affected, it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in its negotiations.

" (c) In all cases where more than one of the Governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those Governments before and during the negotiations. In the case of treaties negotiated at Imperial Conferences, where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately repre-

sented, such representations should also be utilised to attain this object.

“(d) Steps should be taken to ensure that those Governments of the Empire, whose representatives are not participating in the negotiations, should, during their progress, be kept informed in regard to any points arising in which they may be interested.”

The principles here involved came up for reconsideration at the Imperial Conference of 1926, together with the form of signature on behalf of the British Empire. It resolved that if a Government of a dominion has had full opportunity of indicating its attitude and has made no adverse comment, it may be assumed to have concurred in the ratification of a treaty. In the case of a Government of a dominion that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorised to act on its behalf, it will advise the appointment of a plenipotentiary so to act. The British units, on behalf of which the treaty is signed, should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League of Nations, Canada, Australia, New Zealand, South Africa, Irish Free State, and India. A specimen form of treaty was set out in an appendix to the Committee’s previous report. The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign.

**The Imperial Conference (c)—Committee for Imperial Defence.**—The Imperial Conference is a périodic meeting in London of the Prime Ministers of the self-governing colonies, under the Presidency of the English Prime Minister. The Imperial Conference has evolved from the first “Colonial Conference,” as it was then called, which took place in London

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(c) See article “The Imperial Conference and the Constitution,” by Edward Jenks, Cambridge Law Journal, vol. iii, No. 1, 1927.

in 1887 on the occasion of Queen Victoria's Jubilee. The idea was at first distrusted by the Governments of the colonies, who saw in it an attempt by the Imperial Government to restrain the growth of Home Rule in the dominions, by extracting pledges from visiting Prime Ministers which they were not licensed by their Legislatures to give. The first Colonial Conference of 1887 was attended by representatives from many of the Crown Colonies, and by members having no official status, and its discussions were necessarily of an inconclusive character. The next Conference was held in 1897 on the occasion of the celebration of Queen Victoria's Diamond Jubilee. The Conference in that year was confined definitely to representatives of the self-governing dominions, who were understood to speak in an official capacity. The coronation of King Edward VII was marked by another Colonial Conference, which considered the proposals which were then being made by Mr. Joseph Chamberlain for an Imperial Customs Union based upon Imperial Preference.

In 1907 a Conference was held in London for the first time, not on an occasion of public celebration, and it was then decided to call the Conference in future the Imperial Conference. It was marked by a free discussion of the constitutional relations of the self-governing colonies with the Imperial Government. This discussion paved the way for the grant of self-government to the Union of South Africa embodied in the South Africa Act, 1909. The colonial Prime Ministers also criticised the system of correspondence between the Colonial Office and the Governments of the self-governing dominions, and as a result a separate Dominions Department was established in 1911 in the Colonial Office. In 1911 the Imperial Conference met for the first time under its new name, and although India was not, as such, represented, on the grounds that India was not a self-governing dominion, the Secretary of State for India took part in the deliberations. New Zealand and South Africa then brought forward a specific resolution that "it is essential that the Department of the Dominions be separated from that of the Crown Colonies, and that each Department be placed under a separate Permanent Under-Secretary."

The next Imperial Conference should have been held in 1915 but the Prime Ministers of the self-governing colonies were then too busily engaged on war measures in their respective dominions to attend any formal Conference in London.

Visits were, however, paid during the first two years of the war by Colonial Prime Ministers to London, and there were several meetings of Colonial Prime Ministers in London during the years 1917 and 1918 under the Presidency of the English Prime Minister. From these informal meetings was evolved the Imperial War Cabinet, which was merely a standing committee of Prime Ministers in London which sat to consider the best means of co-operation between the British Government and the colonies for prosecuting the war. The Imperial War Cabinet was not a cabinet in the strict sense, seeing that the English Prime Minister was only President at its meeting, and had no precedence over others, and no means of enforcing a common policy. On the other hand, the Cabinet had no control over the plans of campaign or disposition of the forces, which remained with the Imperial War Office and Admiralty. In 1918 the unexpected advance of the Allies necessitated a general Conference in London to settle the terms of peace which would shortly be offered to Germany. In 1919 the meetings of the Imperial War Cabinet were transferred to Paris, and the British Prime Minister, after consulting the Imperial War Cabinet, agreed with the Prime Ministers of France and Italy and the President of the United States, the principles upon which the Empire should be represented by an Empire Delegation. Since 1919 India has had a measure of self-government, under the Government of India Act, 1919, which has been recognised by the appointment of an Indian representative first to the Peace Conference at Paris, and later to the subsequent meetings of the Imperial Conference. Since 1917 the Secretaryships for the Colonies and the Dominions Office have been kept entirely separate, though the Dominions Office is still housed in the same building, and the two secretaryships are still combined, for reasons of economy, in one person. Since 1917 the English Prime Minister has been kept informed of all matters of world politics taking place in the colonies, and there has been a demand

by the dominions that the British Prime Minister in all future ministries shall hold the portfolio of the Secretaryship for the Dominions. It has, however, been thought expedient by the Imperial Government that the Prime Minister should not be burdened by so onerous an office while he has his other duties to perform as the head of the Government in this country, and the dominions are still administered by a Secretary of State, who also looks after the affairs of the Crown Colonies in a dual capacity. The principle has, however, been accepted that if the Prime Minister of a dominion considers a matter is one of sufficient urgency he is at liberty to communicate direct with the English Prime Minister, and is not bound to keep to the ordinary channel of communication *via* the Governor-General and the Colonial Secretary.

The conclusion of peace in 1923 brought about the dissolution of the War Cabinet as such, but to some extent it has been revived in the shape of the Committee for Imperial Defence. This consists of the Lord President of the Council, the Lord Privy Seal, the Secretary of State for Foreign Affairs, the Chancellor of the Exchequer, the Secretary of State for Dominion Affairs, the Secretary of State for the Colonies, the Secretary for War, the Secretary of State for India, the First Lord of the Admiralty, the Secretary of State for Air, the Chiefs of Staffs of the three fighting forces, the Permanent Secretary to the Treasury, and other ministers, officers, officials or experts of the Home Government, the Dominions and India as are invited, as the occasion offers. There have also been formed various permanent standing committees, such as the Imperial Shipping Committee and the Imperial Economic Committee, in which the Dominions are directly represented and which work in accordance with a general policy laid down by the Imperial Conference, and the Overseas Settlement Board which has to deal with the management of emigration within the Empire. There have also taken place since 1920 what were really extraordinary meetings of the Imperial Conference, namely, the conference which preceded the Washington Disarmament Conference in 1921, the Conference on War Reparations in 1923, and the Conference on Smuggling into the U.S.A. in 1924.

The establishment of Ireland as a self-governing dominion has added another member to the Imperial Conference which thus, at the last Conference in 1926, was attended by the Prime Ministers of Canada, Australia, New Zealand, South Africa, the Irish Free State, Newfoundland, the Mahraja of Burdwan on behalf of the Indian Delegation, the Secretary of State for Dominion Affairs and the English Prime Minister.

## CHAPTER VI.

REPRESENTATION OF THE CROWN IN THE COLONIES: APPLICATION OF THE CONSTITUTIONAL MAXIMS IN THE COLONIES—THE GOVERNOR—HIS DUTIES—HIS SALARY—THE GOVERNOR AND LIEUTENANT-GOVERNORS OF CANADA—THE GOVERNOR-GENERAL AND GOVERNORS IN AUSTRALIA—THE GOVERNOR-GENERAL AND ADMINISTRATORS IN SOUTH AFRICA—CIVIL LIABILITY OF THE GOVERNOR—CRIMINAL LIABILITY—THE USAGES OF THE ENGLISH CONSTITUTION INCORPORATED IN THE CONSTITUTIONS OF THE DOMINIONS.

All Government is the King's Government.—By Proclamation under the Royal Titles Act, 1901 (1 Edw. 7, c. 15), the title of the Crown was settled as “George V by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.” In view of the alteration of status of Ireland the title was considered anomalous, and upon the recommendation of the Imperial Conference, 1926, it was altered by Proclamation under the Royal and Parliamentary Titles Act, 1927 (17 Geo. 5, c. 47), to “George V by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas, Defender of the Faith, Emperor of India.”

Although a dominion may obtain a measure of self-government the maxim applies that “the king is present throughout his territories.” All government in any part of the British Empire is carried on in the name of the King. Summonses are issued in his name: prisoners are prosecuted in the name of the King: all laws passed are the King's laws, and in many colonies laws are cited as in England according to the year of his reign.

The Armed Forces of the Crown in the Colonies.—Until the middle of the last century the memory of the secession of the American colonies still lingered in the minds of Imperial legislators, who discouraged the maintenance of standing armies in the service of colonial Governments as a temptation to break their

bonds with the mother country. In all the dominions as well as in India the Imperial Government maintained garrisons of troops recruited in England, and it was not till 1905 that the garrisons at Halifax and Esquimault were withdrawn. India is still, to some extent, garrisoned by Imperial troops.

The defeat in 1870 of France, then considered the first military power in Europe, obliged England to consider seriously the possibility of her being at some future time drawn into a European conflict and to organise her military strength for such an event. The military aspirations of Napoleon III had promoted the volunteer movement in England, and the necessity of withdrawing troops from scattered colonial garrisons to England or to stations where they could be quickly mobilised in the event of European war obliged the dominion Governments to raise forces under Acts of their own Legislatures. In this they were encouraged by the Imperial Government in order to relieve the Imperial exchequer of some of the strain in protecting at that time, without any kind of dominion assistance, every part of British territory throughout the world.

The Imperial Government has no control over troops so recruited in the dominions and paid out of dominion revenues, and cannot use them without consent of a dominion Legislature in foreign countries or other parts of the Empire. The Imperial Government has, with the consent of dominion Governments, from time to time enlisted the service of colonial volunteers for service overseas. The first occasion on which colonial troops were used in considerable numbers was in 1881, when Canadian troops were employed to navigate barges forming part of the Egyptian expedition over the cataracts of the Nile. It was then recognised that though colonial troops recruited under Acts of a colonial parliament remain the King's troops and owe allegiance to him, the Commander-in-Chief has no power to alter their conditions of service or rates of pay. The difficulties of dealing with a body of troops attached to the Imperial forces for duty but not for discipline led to the insertion of section 177 of the Army Act, 1881 (44 & 45 Vict. c. 58), which provides that where any force of volunteers or of militia or any other force is raised in India or in any colony, any law of India or the colony may

extend to it whether the force is serving in or outside India or the colony, but if such force is serving as part of His Majesty's regular forces then, so far as the law of India or the colony has not provided for its government and discipline, the Act of 1881 applies, subject to such orders as the General in command shall make.

While the dominion troops remain in the dominions the Imperial Government has no control over their use, and although a declaration of war by the Imperial Government extends a state of war to all parts of the Empire, the dominion Governments are free to give or refuse assistance to the Imperial Government as they think fit. During the Great War, New Zealand in 1916 and Canada in 1917 adopted conscription, but the Australian electorate on a referendum refused to agree to compulsion; and when arrangements were made in 1918 with the United States for rendering liable for service British citizens living in the United States, Australians were excluded from the operation of the agreement.

Dominion troops forming part of the armies in France were brought within the discipline regulations of the Imperial Army Act, but serious difficulties did not in practice arise because, although the higher command was mostly in the hands of officers lent from the Imperial General Staff, the officers in immediate contact with the non-commissioned officers and men were promoted from the ranks of the dominion troops or recruited in the same way as temporary officers in the English Army.

Schemes for organising Imperial defence have several times been suggested, based on control over all the land forces of the Empire being under the control of a General Staff in close contact with a General Staff in each of the self-governing dominions. Nothing has come of such schemes, though officers and non-commissioned officers are frequently lent from the Imperial forces to dominion staffs for purposes of giving instruction and providing for similarity in training, so that dominion troops can more effectively form part of a British army in the field if ever called upon. Reports are also furnished to the Imperial Staff of the equipment and ammunition used by dominion forces so

that serious disadvantages arising out of the use of equipment dissimilar to that used by the rest of the forces of His Majesty may be obviated. Before the War Canadian troops were trained to use the Ross rifle, and at the outbreak of the War this proved such a disadvantage in the employment of Canadian troops that it had to be discarded, and now the British service rifle is used by all troops throughout the Dominions.

The growth of the dominion navies dates from the Colonial Naval Defence Act, 1865, which enabled the Australian colonies to maintain a few gunboats to be used in Australian territorial waters.

At the Colonial Conference in 1887 it was agreed that the cost of naval defence of the Empire ought not to fall wholly upon the mother country and the Australasian colonies volunteered to make a contribution towards keeping a stronger force in Australian waters. The Cape and Natal colonies after 1902 also agreed to make some contribution.

In 1908 the growing competition in naval armaments between England and Germany necessitated the withdrawal of ships from Far Eastern stations and their concentration in the North Sea. In 1909 New Zealand agreed to furnish a Dreadnought to the fleet and Australia intimated that she was willing to bear some of the burden, but was anxious that ships contributed by her should be kept as an independent unit analogous to an Australian navy. The Imperial Admiralty insisted that the whole naval strength of the Empire should in time of war be kept under one command and in 1909 it was agreed at the Army and Naval Conference between Great Britain and the colonies that Australia and Canada should be allowed to build and maintain independent fleets, but in the event of war they should automatically be placed under the command of the Imperial Admiralty. Meanwhile the personnel was to be trained upon the same lines as the officers and men of the Imperial navy and standard equipment was to be employed in the construction of dominion vessels.

At the Imperial Conference it was agreed that definite stations should be set aside for the use of the dominion fleets, and that they should fly the white ensign of the British navy and at the

Jackstaff also the distinctive flag of the dominion. If dominion ships went out of their territorial waters the British Government was to be informed, and they were not to put into foreign ports without the consent of the British Admiralty. For the purpose of training the personnel of the dominion fleets officers were to be lent from the British navy, and officers of the dominion navy were to rank for seniority according to the date of their commissions and might be similarly transferred from a dominion to the British navy. Discipline was to be enforced in the dominion navies by orders and regulations framed on the lines of the King's Regulations and Admiralty instructions governing discipline in the British navy, and it was understood that in time of war Dominion vessels were to come under the control of the Admiralty and be subject to the orders of the Admiral commanding the British fleet. By the Naval Discipline (Dominion Naval Forces) Act, 1911 (1 & 2 Geo. 5, c. 47), the Naval Discipline Act, 1866, was made to apply to the naval forces raised by the dominions if and when so provided by the Legislature of any self-governing colony, with any modifications and adaptations made by such Legislature; but where dominion ships form part of the naval forces placed at the disposal of the British Admiralty by a Dominion the Naval Discipline Acts were to apply to them without modification. By the Naval Discipline Act, 1922 (12 & 13 Geo. 5, c. 37) naval officers and men serving by order of the Admiralty in a dominion ship or awaiting passage to any destination in a dominion are subject to the laws and customs applicable to the dominion navy.

Until 1913 New Zealand had been content to make contributions to the British navy. Canada in 1910 had also passed an Act providing for a separate Canadian navy, but the programme of building ships was never proceeded with, and, at the outbreak of war, Canada had only two small cruisers at her command stationed in Halifax harbour.

At the outbreak of the War the Australian and New Zealand navies were placed at the immediate disposal of the British Government and bore a very honourable part in capturing the *Emden* and other German cruisers which escaped into the Atlantic and for many months preyed on British shipping.

Since the War both India and the Irish Free State have voted sums for the construction of ships for coastal defence.

Although the dominion Governments in the event of war have the right to refuse to allow dominion troops or ships to be employed overseas, soldiers or sailors owe ligiance to the King and a contract between a soldier and a dominion Government to serve on certain conditions is nevertheless a contract to serve the King. This was well illustrated in the case of *Williams v. Howarth*, [1905] A. C. 551. The respondent, Howarth, had served as a soldier in the New South Wales contingent in the Boer War. As such he claimed from the appellant as nominal defendant on behalf of the Crown or Government of New South Wales money which he alleged was due to him in respect of 490 days' service from December 28, 1899, till May 1, 1901, at 10s. per day and gratuity on discharge in accordance with the terms of his enlistment, less certain payments made to him which left a balance of £100 9s. During the time he had served in South Africa he had received pay from the Imperial Government at the rate of 4s. 6d. per day and the Government of New South Wales claimed to set off this amount as money paid by the Imperial Government on behalf of the Government of New South Wales. The Supreme Court of New South Wales gave judgment for the defendant for this amount. The New South Wales Government appealed to the Privy Council on the grounds that the respondent had been paid 4s. 6d. a day as Imperial pay and 5s. 6d. as Colonial pay. The claim against the Crown was for 10s. per day, and had been satisfied in full. Whether the respondent was paid out of the funds granted to the Crown by the Imperial Parliament or out of the funds granted by the colonial parliament was immaterial, as the respondent received his pay at the contract rate of 10s. per day. The Privy Council in reversing the decision of the Supreme Court of New South Wales, held that the Government in relation to the contract of enlistment of a soldier is the King himself. The soldier is his soldier, and the supplies granted to the King are the King's supplies and the Appropriation Act, whenever an Appropriation Act is passed, simply operates to prevent their being applied to any other purposes.

Similarly in *Gavin Gibson & Co. v. Gibson*, [1913] 3 K. B. 378 (see p. 93) it was held that a person born in a colony does not become a "subject" of that colony: he remains a subject of the King. Similarly any part of the British Empire is British territory coming within the ligiance of the King. A colonial Legislature may pass a law restricting the entry of aliens into a colony and a colonial minister may as an act of state refuse entry of aliens into a colony because an alien has no legal right enforceable by action to enter British territory (*Musgrave v. Chun Teeong Toy*, [1891] A. C. 272).

**Application of other constitutional maxims to the Dominions and Colonies.**—The other maxims of constitutional law apply equally in the colonies as in England. Thus the "King can do no wrong" in a self-governing colony any more than in England, and, although a claim based on contract can be proceeded with by petition of right, a colonial Government no more than the Imperial Government can be sued in tort. Thus in *Sloman v. Government of New Zealand*, 1 C. P. D. 563, it was held that the Governor and Government of the colony of New Zealand was not a corporation that could be effectually served with a writ under Order IX, r. 8. An apparent exception to this rule occurs in Australia, where it is provided by special Act that the Government may be sued as an ordinary litigant, but execution cannot be levied nor can any action *in rem* be taken against the property of the Crown in the colonies or elsewhere. Thus in *Young v. S.S. Scotia*, [1903] A. C. 501 (a), the plaintiff was master of a ship the *Furnesia* who took proceedings under a salvage claim against the Canadian Government vessel the *Scotia* and sought to have the vessel seized in satisfaction of his claim. The *Scotia* was a vessel which had been built for the Canadian Government for service as a ferry-boat to connect two Government railways. While under the control of the builders it got into difficulties; it ran out of coal and was in danger of becoming a derelict in the North Atlantic Ocean. Supreme Court of Newfoundland found that salvage services of a valuable and meritorious character and

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(a) See similar case *The Broadmayne*, [1916] P. 64, salvage claim against a steamship requisitioned by the Crown during the War.

deserving of high and liberal reward had been rendered by the *Furnesia*, but held that the *Scotia* was at the time of the salvage services, and still was, the public property of the Dominion of Canada and therefore the public property of His Majesty and could not be arrested or proceeded against in a claim of salvage. The Privy Council affirmed the Supreme Court's decision that no action *in rem* could be brought to attach Government property in a salvage claim.

The rule that claims of the Crown have priority over all other's claims applies in the colonies as well as in England unless the rule is barred by colonial statute. Thus in the *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A. C. 487, the Government of New Brunswick had deposited with the branch of the Maritime Bank at St. John, New Brunswick, sums amounting to \$35,000 which were public moneys deposited there in the name of the Receiver-General. The Maritime Bank subsequently failed and went into liquidation. The Supreme Court of Canada were asked to decide whether the provincial Government was entitled to payment in full in preference over noteholders of the bank; secondly, if not, was the provincial Government entitled to payment in full over the provincial depositors and simple contract creditors. The Supreme Court answered both questions in favour of the provincial Government and the Privy Council affirmed the Supreme Court's decision.

In *R. v. Att.-Gen. for British Columbia*, [1924] A. C. 213, it was held that the Crown is entitled to an unclaimed trust fund left over after liquidation of a company as *bona vacantia*, and such *bona vacantia* belong under section 109 of the British North America Act, 1867, with other *jura regalia* to the province in Canada in which they are situate or arise and not to the dominion.

In *Att.-Gen. for Alberta v. Att.-Gen. for Canada*, [1928] W. N., p. 175, the Supreme Court of Canada had been asked the following questions:—(1) Do lands in Alberta granted by the Crown since September 1, 1905 (the date when the Alberta Act came into force admitting Alberta as a new province), which have escheated for want of heir, escheat to the Crown in right of

the dominion or of the province? (2) Do escheated lands in Alberta granted before September 1, 1905, which have not become Crown lands by escheat or otherwise prior to that date, escheat to the dominions or to the province? (3) Does personal property in Alberta of persons there domiciled and dying intestate after September 1, 1905, without next-of-kin go to the Crown as *bona vacantia* in the right of the dominion or of the province? (4) Is the Ultimate Heir Act (Alb. 1921, c. 11) *ultra vires*?

The Supreme Court of Canada answered these questions as follows:—

(1) Dominion; (2) Dominion; (3) Province; (4) Yes. On appeal to the Privy Council the decision of the Supreme Court was affirmed and the appeal dismissed.

**The Governor.**—The Governor of a colony has no prerogatives although he represents the Crown, except such as are delegated to him by the terms of his commission. The Viceroy of India has, and formerly the Lord Lieutenant of Ireland had, special prerogatives, both as representing the Crown and by virtue of his office. Thus in *Tandy v. Earl of Westmoreland* (1792), 27 S. T. 1246; *Luby v. Wodehouse* (1865), 17 Ir. C. L. R. 618, and *Sullivan v. Earl Spencer* (1872), Ir. R. 6 C. L. 173, it was held that no action was maintainable against the Lord Lieutenant of Ireland in an Irish Court during continuance in office for any act of state. But the Governor of a colony has neither personal prerogatives of the Crown, nor save in so far as they have been expressly delegated to him has he any official prerogatives.

*The mode of appointment of Governor.*—The office itself—i.e., the governorship—is created by Letters Patent under the Great Seal. The Letters Patent are usually permanent, those, for example, for Canada have not been altered since 1878, but unlike the Letters Patent under which a Legislature may be granted to a Crown Colony are revokable.

Each particular Governor is personally appointed by a commission from the King. The commission constitutes his power to act and fill the office. His individual powers are set out in Instructions under the Sign Manual. These instruct the Governor how to exercise the prerogative intrusted to him,

e.g., what bills to reserve, in what cases the prerogative of pardon is to be exercised, etc.

*The Duties of the Governor.*—In general the duties of a Governor consist in :—

1. Pardoning or respiting criminals. This power is vested in him by virtue of his commission as Governor and applies to all sentences of a punitive character as, for example, a sentence of imprisonment for contempt of Court. (*In the Matter of a Special Reference from the Bahama Islands*, [1893] A. C. 138.)

2. Moneys expended for public service in the colony are issued under his warrant.

3. Writs for elections are issued in his name and he convokes and prorogues the legislative body of the colony.

4. He appoints absolutely or temporarily and provisionally suspends and dismisses public servants.

5. He administers the appointed oaths to all persons in office or not whenever he may think necessary, particularly the oath of allegiance.

6. He may grant or withhold his assent to bills passed by the Legislature.

7. He may not leave the colony without the permission of His Majesty, nor receive or give presents, nor forward without permission articles for presentation to His Majesty. Presents which cannot be refused must be handed over to His Majesty's Government.

8. By the Colonial Fortifications Act, 1877 (40 & 41 Vict. c. 23), s. 1, the Governor may have fortifications and other public works vested in his name; and he has frequently duties in regard to emigrant vessels under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 367).

*Limitations on the Powers of the Governor.*—In general, unless the Governor has express power granted to him in respect of a particular act, a Governor has no power :—

1. To declare war or peace with another Power.
2. To grant titles of honour.
3. To exercise the prerogative of mercy unless it is expressly delegated to him.

*The Governor's salary.*—The Governor's salary is not placed

upon the annual estimates of the expenditure of the colony, but is voted under a permanent Act. Section 105 of the Canadian Constitution provides that it shall be £10,000 a year but may be altered by Act of the dominion parliament. Section 3 of the Australian Constitution contains a similar provision but adds that the salary of the Governor-General shall not be altered during his continuance of office. In this way a vote of censure upon the Governor of the colony in the form of a motion to reduce his salary cannot be passed by a colonial Legislature with the object of getting the Governor superseded. The pensions of Governors are now governed by the Pensions (Governors of Dominions, etc.) Act, 1911 (1 & 2 Geo. 5, c. 24), which consolidated the law relating to the payment of pensions to Governors in any part of His Majesty's dominions, or any British protectorate, or persons holding similar office.

**Refusal of the Governor to act in carrying out his duties.—**

No procedure is available for compelling a Governor to act who refuses or neglects so to do. Thus in *R. v. Governor of Australia*, 4 Comm. L. R. 1487, an application was made for a writ of mandamus to compel the Governor of South Australia to issue a writ for a new election to the senate. The application was refused on the grounds :—

- (i) That the Governor was the representative of the State.
- (ii) That the duty sought to be enforced was a duty to the Sovereign by whom he was appointed and not to the individual citizen.

**The Governor and Lieutenant-Governors of Canada.—**The Governor of a self-governing colony is generally styled the "Governor-General"; that of a Crown colony "Governor" simply. In Canada the Governor of the dominion is called the "Governor-General," and the Governors of the provinces are styled "Lieutenant-Governors."

The powers of the Governor-General of Canada are described generally in sections 9, 10, 11 and 14 of the British North America Act, 1867, but the mode in which he is expected to exercise them are contained in the permanent instructions which, since 1878, have not been amended. Before 1878, the

Governor-General was forbidden by his instructions to assent to any bill relating to—

1. Divorce.
2. Grant of money to himself.
3. Making paper money legal tender.
4. Imposing differential duties.
5. Containing provisions inconsistent with treaty obligations.
6. Interfering with the discipline or control of the Crown's forces.
7. Interfering with the Royal prerogative, or with rights and property of British subjects outside the dominion, or prejudicing British trade and shipping.
8. Containing provisions to which assent had already been refused at home.

Bills relating to any of these subjects had to be reserved for the consideration of the Imperial Government. Some twenty-one bills were in this way reserved between 1867-77, which led to a great deal of controversy. In 1869 occurred the first Red River Rebellion which was put down by the expedition under Wolseley. The way in which the Governor-General afterwards exercised the prerogative of mercy was criticised, and in the following years Mr. Blake, the Canadian Minister for Justice, came to England and conferred with the Imperial Government on the subject. In 1878 when Lord Lorne was appointed Governor-General the instructions were amended so that the practice now with regard to bills which would require reservation is to insert a suspending clause in them, and they do not come into force if they are disallowed by the Imperial Government. The instructions also provide that the prerogative of pardon shall not be exercised in capital cases save with the advice of the Canadian Privy Council. In any case in which a pardon or reprieve might directly affect the interests of the Empire, or of any country or place beyond the jurisdiction of the Government of the dominion, the Governor-General, before deciding, must take those interests specially into his personal consideration in conjunction with the advice of his ministers.

*Inter alia* in the Constitution of Canada it is provided that—

1. The Governor-General in Council may be authorised by the Crown to appoint deputies to exercise his powers (section 14).

2. He has general powers to do all things contemplated as being within the scope of his office.

3. He has custody of the Great Seal.

4. He appoints the Judges of the superior Courts and officers and ministers of the dominion.

5. He has power to prorogue or dissolve the Dominion Parliament.

6. He may assent in the name of the Crown or withhold assent or reserve bills passed by both Dominion Houses of Parliament.

The Lieutenant-Governors of the Provinces are appointed by the Governor-General of Canada in Council under the Great Seal of Canada.

*Lieutenant-Governors in Canada.*—A lieutenant-governor holds office during the pleasure of the Governor-General, but is not removable within five years of his appointment except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made. In deciding upon the removal of a Lieutenant-Governor of a Province the discretion of the Canadian Ministry appears to be absolute. There have been two notable cases, Mr. Letellier de St. Just, Lieutenant-Governor of Quebec, removed from office in 1879, and Mr. McInnes, Lieutenant-Governor of British Columbia, removed from office in 1900.

The salaries of the Lieutenant-Governors of Canada are fixed and provided by the Parliament of Canada, and during the absence, illness or inability of a Lieutenant-Governor, the Governor-General may appoint an Administrator to act in his place. The powers of the Lieutenant-Governors of the Provinces within their respective provinces under the provisions of section 65 remain what they were before the passing of the British North America Act, 1867, and a Lieutenant-Governor can still, under section 65, exercise the prerogative of the Crown, as for instance, in creating companies by charter, although the Provincial Legislature may have subsequently passed Acts under

which companies may be incorporated. (*Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A. C. 566.)

**The Governor-General and Governors in Australia**—In the Constitution of Australia the provisions relating to the office of Governor-General are similar to those in the Canadian Constitution. He is precluded from receiving any salary in respect of any other office during his administration of the government of the Commonwealth. Sections 58, 59, and 60 provide that the Governor-General may assent to bills in the name of the Crown, withhold assent or reserve them for the Queen's pleasure, or further, he may return bills to the House in which they originated with any amendments which he may recommend. “The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of Parliament, or by Proclamation, shall annul the law from the day when the disallowance is made known.

“A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's consent the Governor-General makes known, by speech or message to each of the Houses of the Parliament or by proclamation, that it has received the assent of the Crown.”

The Governors of the respective colonies of Australia are, unlike the Lieutenant-Governors of the provinces of Canada, not appointed by the Governor-General. They retain the same powers as before the passing of the Constitution Act, 1900, save that under section 70 in respect of matters which under the Constitution pass to the Executive Government of the Commonwealth, “all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony, or in the Governor of a colony with the advice of his executive council, or in any authority of a colony shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.”

The Governor of a State is nevertheless expected to act impartially; and not take sides in party controversies. In 1917, the question of the abolition of the Upper House in the Queensland Legislature was referred to the Queensland electorate and decisively rejected. In 1920 the Labour Government obtained the appointment of an ex-Labour Minister to act in the absence of the Governor, and through him obtained the appointment of a number of members to the Upper House in order to ensure the passage of two measures which the Upper House regarded as confiscatory in principle. The two Acts were not disallowed by the British Government, and while they remained unrepealed it was impossible for the Queensland Government to raise further loans in the London market. The assent to the swamping of the Queensland Upper House for party motives by the acting Governor, followed by the defeat of the Labour Party in Queensland at the polls in 1920, called for an inquiry into the duties of the Governor, and the principle was reasserted that the office of Governor should be kept aloof from party politics.

The Governor-General of a dominion is still the official agent of communication between the Imperial Government and the Dominion Government. Technically he is still the agent of the King though he is no longer appointed solely upon the advice of the Imperial ministers in London. At the Imperial conference, 1926, it was proposed that communication between the Dominion governments, and the Imperial government should be made direct, and the representatives of Great Britain accepted the proposed change in principle in relation to any of the Dominions which desired it.

**The Governor-General and Administrators in South Africa.** —The Governor-General of South Africa has a dual capacity. He is the King's representative as Governor of a dominion and incidentally acting with the advice of responsible ministers is further charged with jurisdiction over natives within the Union, and in his second capacity he acts as High Commissioner with a jurisdiction over natives in protectorates or native territories outside the Union. He owes this dual capacity to his having succeeded, under section 147 of the South Africa Act, to the powers of the Governor of the Cape Colony, who, prior to the

Union, acted both as Governor of the colony, acting with the advice of responsible ministers, and as High Commissioner, paid a salary out of Imperial funds, with extra-territorial jurisdiction in Bechuanaland, Basutoland, Pondoland, Swaziland, and other native protectorates established by the British Crown during the latter half of the last century. (See *The King v. Crewe; Ex p. Sekgome*, [1910] 2 K. B. 576, p. 120).

The Governors of Natal, Transvaal and Orange River Colony had similar jurisdiction over natives which they were entitled to use in their personal discretion without the advice of ministers.

The Governor-General of the Union has succeeded to these jurisdictions, but is expected to act with the advice of his ministers.

*Jurisdiction over Natives within the Union of South Africa.*

—In regard to the exercise of jurisdiction over natives within the Union the bitterest controversy has been aroused over the policy of differentiation between white and coloured labourers in the mines. Many of the mine owners assert that they cannot keep open their mines if they are obliged by regulation or force of public opinion to pay the current rates of wages to white labour in them, and by closing the mines many whites will be put out of employment, whereas, if they are allowed to employ coloured labour in charge of machinery and other jobs hitherto kept exclusively for Europeans, the mines can be kept open and the livelihood of many Europeans safeguarded. Against this policy the Labour Party are opposed on the grounds that the introduction of coloured labour in the mines will reduce the wages of Europeans, while the national party, carrying out the Boer tradition of keeping the native races in subjection, assert that it would be a menace to the nation and render impossible any solution of the native problem, if coloured labourers were put in jobs where they would supervise and have disciplinary powers over whites. In *R. v. Hildick Smith*, [1924] Transvaal Prov. Div. 69, the Union Parliament had passed the Mines and Works Regulation Act, 1911, enabling the Ministry of Mines to make orders and regulations governing employment of labour and working conditions in mines. Regulation 179, promulgated by order of the Governor-General under the Act, provided that the

operation of or attendance on machinery should be in charge of a competent shiftman, and in the Transvaal and Orange River Provinces such shiftman should be a European, but unskilled persons working under his direction might be employed on such operations or attendance on machinery, provided that the shiftman exercised effective control. The regulation, although expressed to be a factory regulation for the security of the workers, was really intended to prevent coloured labour from being put in charge of better-paid jobs. Hildick Smith, a manager in one of the mines, was charged with contravening the regulation by employing coloured labour, and appealed from his conviction on the grounds that Regulation 179 was *ultra vires*. The High Court held, as had been the general opinion for a long time back, that the regulation was *ultra vires* because it was not made for a purpose contemplated by the Act, but really imposed serious disabilities upon a whole class of British subjects by excluding them from certain forms of employment on account of their colour.

General Hertzog then introduced a special Act, the Colour Bar Bill, which reimposed the disabilities, and on May 12, 1926, the Act was passed by the South African Parliament by a majority of eighty-three to sixty-seven, after a three days' debate in a joint session of both Houses. Voting was strictly on party lines and only two Cape members of the Labour Party voted against the Bill.

*Jurisdiction over Natives Outside the Union.*—Section 151 of the South Africa Act made special provision for the transfer of native territories to the Union. There were then, in 1909, three main native protectorates, Basutoland, Bechuanaland and Swaziland, and their inhabitants have never been in favour of being absorbed within the Union. Meantime, they have been administered by Resident Commissioners under the direction of the Governor-General as High Commissioner. The schedule to the South Africa Act provides for the administration of such native territories if they are so absorbed. Legislation over such territory is not to be in the hands of the Union Parliament, but vested in the Governor-General in Council, while the administration of the territories is to be in

the hands of the Prime Minister, who is to be aided by a standing Commission appointed by the Governor-General in Council. The administration of natives within the transferred territory will therefore not be in the same hands as the administration of natives already within the Union, and will be outside the interference of political parties in the Union Parliament. Section 14 of the schedule guarantees the integrity of native lands; section 15 provides for the prohibition of the liquor traffic within native transferred territories; section 16, protection of native customs, and section 20 provides that the King in Council may disallow any proclamation made by the Governor-General in respect of transferred territories. The provisions in the schedule may be amended by the Union Parliament, but any amendment must be reserved for the signification of His Majesty's pleasure.

*The Administrators of the South African Provinces.*—Whereas a Canadian province is governed by a Lieutenant-Governor in the name of the King, the head of a South African Provincial Government is styled "the Chief Executive Officer," or more shortly, "the Administrator." He is a public official of the Union Government whose salary is paid out of Union funds. Although the Lieutenant-Governor of a Canadian Province is paid a salary out of dominion funds and can be removed by the Governor-General in Council, he is, while he holds office, the representative of the King in the province. The administrator of a South African province is a civil servant of the Union Government who carries out the administrative work of the Governor-General as his paid deputy. (See pp. 208—207.)

**Civil Liability of a Governor.—*In Contract.***—When a Governor enters into a contract on behalf of the Government of a colony (b), if there is a breach of the agreement, the other party has the same remedies in the colonial Courts against the Crown by way of petition of right, as

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(b) A contract, even if sealed by the minister of the department authorised to make it, does not bind the Crown unless authorised directly or indirectly by the Governor-General in Council (*MacKay v. Att.-Gen. for British Columbia*, [1922] 1 A. C. 457).

in England. But in such circumstances the Governor is not personally liable. Thus, in *Macbeath v. Haldimand* (1786), 1 T. R. 172, Haldimand, as Governor of Quebec, had entered into certain agreements with the plaintiff, who had supplied goods for the public service. The Quebec Treasury subsequently refused payment for the full amount claimed by the plaintiff on the grounds that the charges made by the plaintiff were extortionate. He then brought an action for the balance against the Governor. It was held that the defendant was not personally liable. The judgment was based on public policy, that it was undesirable to create a precedent making a Governor personally liable for goods supplied for the use of the Crown, for, in that event, few persons would accept the position of Governor.

On the other hand, where a Governor contracts private debts the fact that he is Governor does not prevent his being sued in his private capacity for what he owes. Thus, in *Hill v. Bigge* (1841), 3 Moo. P. C. 465, Sir George Hill incurred a debt in his private capacity in England and before his appointment as Governor of Trinidad. He was subsequently sued in the Court of civil jurisdiction in the Island of Trinidad, and appeared under protest. He pleaded that he could not be sued there, and on appeal to the Privy Council, argued that by the terms of his commission he was vested with legislative, as well as executive, power, and was not within the jurisdiction of the Courts of the colony he governed. The Privy Council held that he could claim no privilege. On the analogy of an English Judge who may be sued in the English Courts, it was held that the authority of a Governor is only delegated from the Sovereign, and is strictly limited to the terms of his commission. If a Governor is liable to pay dues in his private capacity he cannot claim exemption by virtue of his authority as the King's delegate. Thus, in *Cameron v. Kyte* (1835), 3 Knapp, P. C. 332, Kyte had, in 1824, been appointed deputy Vendue Master of the colony of Berbice, by virtue of which office he became entitled to 5 per cent. commission on the purchase money of all land sold in the island. The Governor, Cameron, bought a private estate and refused to pay more than 1½ per cent. He had no power to reduce the commission without the consent of the Court of

Policy. On appeal to the Privy Council it was held that there is no authority to show a Governor can be considered as having delegation of the whole royal power; and his act not expressly or implicitly authorised by his commission is not equivalent to such an act done by the Crown itself, and is consequently not valid.

*In Tort.*—Similarly, a Governor may be sued in the Court of his colony for torts committed by him in his private capacity, or which are not within the scope of his authority, and therefore are not acts of State. Thus in *Musgrave v. Pulido* (1880), 5 A. C. 102, the appellant was Governor, Captain-General and Commander-in-Chief of Jamaica. He had detained the schooner *Florence*, the property of the respondent, which had put into Kingston for repairs. The respondent brought an action in the Supreme Court of Jamaica and was awarded £14,000 damages against the Governor personally. On appeal, the Privy Council held that a Governor is not privileged from being sued in the Courts of his colony, and that it is within the province of municipal Courts to determine whether any act done by a Governor is within the limits of his authority, and therefore whether it is an act of State.

But even though a Governor exceeds his powers he may be freed from liability if the Legislature of the colony passes an Indemnity Bill in his favour (see pp. 48, 50). Thus, in the civil action, *Phillips v. Eyre* (1867), 4 Q. B. 225, the plaintiff, a negro, brought an action against the Governor of Jamaica for assault and false imprisonment. The Governor pleaded that the acts were committed in putting down a conspiracy and rebellion in the island, and that the Legislative Council of Jamaica had passed a special Act to indemnify the defendant and all other officers concerned in arresting the rebellion. The Court of Queen's Bench held that this defence was well founded. The rule laid down in *Buron v. Denman* (1848), 2 Ex. 167, that if the actions of an officer in the service of the Crown are approved by the Government, they constitute an act of State against which a subject or alien has no remedy, would also apply to a Governor who was guilty of what otherwise would be a tort on the person or property of an alien, even if the alien were

resident in the colony over which the Governor has authority. The Courts are the judge of whether an act is within the authority of a Governor, and a claim that an act constitutes an Act of State could not prevent a subject of the colony from testing its validity as such by an action brought in the Courts of the colony, or in this country.

Thus in *Fabrigas v. Mostyn* (1773), 1 Smith, L. C. 658, an action was brought in the Court of Common Pleas against the Governor of Minorca for false imprisonment and illegal banishment. The plaintiff has been imprisoned and banished on the ground that he had presented a petition to the Governor in an improper manner. The question was left to the jury as to whether the plaintiff's behaviour was likely to stir up sedition and mutiny. They gave him £3,000 damages. The defendant proceeded by way of writ of error to the King's Bench on the ground that no action would lie in England for an act committed in Minorca. Lord Mansfield, L.C.J., held that an "action does most emphatically lie against the Governor."

The decision in *Gidley v. Lord Palmerston* (1822), 3 Brodr. & B. 275 (an action against the then Secretary of State for War) "that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment," applies to all agents of the Crown, including Governors of colonies. Thus, in *Dunn v. Macdonald*, [1897] 1 Q. B. 555, the respondent was "His Majesty's Commissioner and Consul-General of the Oil Rivers Protectorate in Africa. The plaintiff was engaged by the Commissioner on a contract of service with the Crown for three years; and before the end of that time was dismissed. He first unsuccessfully brought a petition of right against the Crown in respect of the dismissal and then an action against the Commissioner for breach of warranty that he had authority to engage him. It was held that the doctrine that an agent is liable to the other contracting party for breach of warranty of his authority to enter into a contract is not applicable to a contract made by a public servant acting on behalf of the Crown.

On the other hand, if it is provided by law that the holder

of a particular office shall not be removed, save in certain circumstances and after certain formalities an official improperly dismissed may claim reinstatement, and the Courts may declare the act of a Governor in dismissing him invalid. Thus, in *John Walpole Willis v. Sir George Gipps*, 5 Moo. P. C. 379, a statute, 22 Geo. 3, c. 75, had empowered the Governor and Council of a colony or plantation to amove persons holding patent offices for neglect or misbehaviour. The Governor and Council of New South Wales, purporting to act under the authority given by this Act, amoved a Judge without giving him an opportunity of answering the charges brought against him, and upon which the order of amotion was founded. It was held by the Privy Council that such an order was illegal and the order was reversed.

**Criminal Liability of a Governor.**—The Governors Act, 1699 (11 & 12 Will. 3, s. 12) provides : “If any Governor, Lieutenant-Governor or Commander-in-Chief of any plantation or colony within H.M. dominions beyond the seas shall . . . be guilty of oppressing any of H.M. subjects beyond the seas within their respective commands, or shall be guilty of any other crime or offence contrary to the laws of this realm or in force within their respective governments or commands, such oppressions, crimes or offences shall be inquired of, heard and determined in H.M. Court of King’s Bench of England, or before commissioners and in such county as shall be assigned by H.M. commission.”

This Act was extended by an Act of 1802 (42 Geo. 3, c. 85), “to all persons employed in His Majesty’s service in any civil or military capacity out of Great Britain guilty of any crime, misdemeanour, or offence in the execution or under colour or in the exercise of any such employment.” The Act applies to indictable misdemeanours, but not to felonies, and trials could be held only before the King’s Bench Division of the High Court. This has now been altered by section 10 of the Official Secrets Act, 1911, which makes it possible to try a Governor under the Act at the Old Bailey as well as in the King’s Bench. In 1802 (21 S. T. 51) when Governor Wall was tried for the murder of Sergeant Armstrong in the Island of Goree, the indictment was framed under a much older Act of Henry VIII, the

33 Hen. 8, c. 23. Governor Eyre, in 1867, was first charged under the Act of 1699, but the grand jury threw out the bill. Had the prosecution been successful the Act of Indemnity, 1866, passed by the Jamaican Legislature, would have been of no avail because it could not have overridden these Imperial Acts. (See p. 48.)

Sections 2 and 6 of the Official Secrets Act, 1889, provided for the trial of a Governor before any competent English Court in the place where the offence was alleged to have been committed, or in England before the High Court or before the Central Criminal Court. The Act was repealed by the Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28), section 10 of which provides :

“(1) This Act shall apply to all acts which are offences under this Act when committed in any part of His Majesty’s dominions, or when committed by British officers or subjects elsewhere.

“(2) An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British Court in the place where the offence was committed, or in the High Court in England or the Central Criminal Court, and the Criminal Jurisdiction Act, 1802, shall apply in like manner as if the offence were mentioned in that Act, and the Central Criminal Court as well as the High Court possessed the jurisdiction given by that Act to the Court of King’s Bench.

“(3) An offence under this Act shall not be tried by any Court of general or quarter sessions, nor by the Sheriff Court in Scotland, nor by any Court out of the United Kingdom which has not jurisdiction to try crimes which involve the greatest punishment allowed by law.”

Section 127 of the Government of India Act, 1915, provides that any person holding office under the Crown in India committing an offence under the Act may be tried, without prejudice to any other jurisdiction, before the High Court, and be dealt with as if the offence had been committed in the county of Middlesex.

**The Incorporation in the Constitutions of the Dominions of the Usages of the English Constitution.**—In the earlier constitutions, e.g., New Zealand, English constitutional usages were not

specially mentioned, although every colonial constitution assumes that the unwritten constitutional conventions of the English Legislature will be followed by the colonial Legislature. In the Constitution of New Zealand, Canada and Newfoundland, there is no direct reference to cabinet government. Its introduction is to be found, if at all, in the Instructions to the Governor and the Letters Patent constituting his office.

**New Zealand.**—The Instructions to the Governor of New Zealand provide that he shall be guided by the advice of the Executive Council; “if the Governor sees sufficient cause to dissent from this advice he may act in opposition to it, on condition that he reports the difference of opinion immediately to the Imperial Government.”

**Canada.**—The instructions are silent about the Governor’s being guided by the advice of his ministers with the single exception that the Governor is not to grant a pardon except on the advice of a minister.

The later Constitutions of Australia, South Africa, and the Irish Free State contain explicit provisions for the institution of responsible government, although frequently its existence is implied or alluded to rather than any direct provision made for its introduction.

In the Constitutions of Australia, South Africa and the Irish Free State, the Instructions to the Governor are silent about his taking the advice of ministers, except in the matter of the prerogative of mercy, but the Constitutions provide explicitly that the Governor shall be advised by the Executive Council, *i.e.*, the Ministry for the time being.

**Australia.**—Australia Constitution Act, 1900, s. 62: “There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.”

Here the legal doctrine is inserted that all government is the King’s government, but that the Governor-General, as the

representative of the King, is to be advised by responsible ministers whom he may dismiss.

This doctrine is further extended by section 64 : "The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

" Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

" After the first election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives."

It was obviously contemplated that the cabinet system of government in Australia should be worked on the same lines as in England. In practice, the predominance of the Labour Party has meant that Ministers have become little more than the nominees of the Labour Party organisation, which dictates the policy of the Government at outside party meetings.

**South Africa.**—South Africa Act, 1909, s. 12 : " There shall be an Executive Council to advise the Governor-General in the government of the Union, and the members of the council shall be chosen and summoned by the Governor-General and sworn as executive councillors and shall hold office during his pleasure."

Section 13 : " The provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Executive Council."

Section 14 : " The Governor-General may appoint officers not exceeding ten in number to administer such departments of the State of the Union as the Governor-General in Council may establish; such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the King's Ministers of State for the Union. After the first general election of members of the House of Assembly, as hereinafter provided, no Minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament."

**Irish Free State.**—Irish Free State Constitution Act, 1922, Art. 51 : “The Executive Authority of the Irish Free State (Saorstat Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown. There shall be a Council to aid and advise in the government of the Irish Free State (Saorstat Eireann) to be styled the Executive Council. The Executive Council shall be responsible to the Dail Eireann, and shall consist of not more than seven or less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council ” (c).

Article 52 : “ Those Ministers who form the Executive Council shall all be members of Dail Eireann and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance.”

“ Constitutional usage,” in the case of *Secretary of State v. O'Brien*, [1923] A. C. 603 (see p. 216), has been interpreted by the Courts to mean “ Constitutional usage in accordance with responsible government,” and the continuance of the intervention of the English Home Secretary in Ireland was deemed to be inconsistent with the creation of an Irish executive in the same position as that of the Dominion of Canada, and thus having exclusive jurisdiction within the territory of the Irish Free State.

That is to say, the Court decided that the grant of responsible government to a Dominion implies the complete cessation of any executive authority on the part of the Imperial Government in the internal affairs of the Dominion in question.

It will be noticed that the Constitutions of Australia, South Africa and Ireland all provide that the members of the responsible government shall have seats in one or the other Houses of the Legislature. This is another instance of the direct incorporation in a written constitution of an English unwritten constitutional usage.

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(c) See article, “ Thoughts on the Constitution of the Irish Free State,” by Prof. J. G. Swift MacNeill, K.C., *Journal of Comparative Legislation*, vol. 5, 3rd series, 1923, p. 52.

It will also be noticed that whereas in the Constitutions of Australia and South Africa there is an implied usage that the Ministry shall be responsible to the Lower House, the Constitution of the Irish Free State specifically provides (Article 51, *cit. supra*) : "The Executive Council shall be responsible to the Dail Eireann."

**Annual Parliaments.**—The Australian Constitution Act, 1900, s. 6, provides : "There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session."

South Africa Act, 1909, s. 22 : "There shall be a session of Parliament once at least in every year, so that a period of twelve months shall not intervene between the last sitting of Parliament in one session and its first sitting in the next session."

Irish Free State Constitution Act, 1922, Art. 24 : "The Oireachtas shall hold at least one session each year. The Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King and subject as aforesaid Dail Eireann shall fix the date of the conclusion of the session of each House : Provided that the sessions of the Seanad Eireann shall not be concluded without its consent."

**Money Bills.**—There are two English rules which are universal in the Dominion Constitutions :

(1) That all money bills must originate in the Lower House of the Legislature. The British North America Act, 1867, s. 53 : "Bills for appropriating any part of the Public Revenue, or for imposing any Tax or Impost shall originate in the House of Commons."

The Australia Constitution Act, 1900, s. 53, the South Africa Act, s. 60, and the Irish Free State Constitution Act, 1922, Art. 35, contain similar provisions.

(2) That all financial proposals of any kind must be recommended to the House by a responsible Minister (*d*).

There had been in the early history of constitutional

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(d) This convention in the English House of Commons is embodied in three standing orders relating to the conduct of the House.

government in Canada notorious scandals arising out of the appropriation of public funds upon resolutions brought by private members. In many cases Ministers had evaded liability for corruptly awarding out of public funds pensions and bribes to their friends by getting private members to introduce the necessary resolutions. As a consequence the Union Act of 1840 made provision for the definite expression in the written Constitution of the usage that there shall be no appropriation of public funds save upon the resolution of a responsible Minister, after a request has been made by the Representative of the Crown upon the advice of the Minister. This provision was afterwards incorporated as section 54 in the British North America Act, 1867: "It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the appropriation of any part of the Public Revenue, or of any Tax or Impost, to any purpose, that has not been first recommended to that House by Message of the Governor-General in the Session in which such Vote, Resolution, Address, or Bill is proposed."

The Australia Constitution Act, 1900, s. 56, the South Africa Act, 1909, s. 62, and the Irish Free State Constitution Act, 1922, Art. 37, contain similar provisions.

**Control of Money Bills by the Lower House.**—The Constitutions of Canada, Australia and South Africa were framed before the passing of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), and consequently those provisions of the Parliament Act which deny any voice to the Upper House in financial legislation are not to be found in the Constitutions of Canada, Australia or South Africa. The older Constitutions of Canada and New Zealand are silent upon how far the Upper House may amend or reject a money bill passed by the Lower House, but there exists, as in England before the Parliament Act, 1911, an unwritten convention that the Upper House may reject, but may not amend, a money bill. Section 53 of the Australia Constitution Act, 1900, specifically provides that the Senate may not amend a money bill, but it may send it back to the House of Representatives with a request for the omission or amendment of any of its items, and the House of Representatives may make any such

omissions or amendments, with or without modifications as it thinks fit.

In Newfoundland the number of members of the Upper House is unlimited, but as the assent of the Imperial Government is necessary for appointments when a dispute arose between the two Houses it was not possible, as in Queensland in 1920, for the Government to swamp the Upper House by the creation of new members (see p. 119), but the powers of the Upper House are now curtailed by provisions modelled upon the English Parliament Act.

In New Zealand the powers of the Upper House over financial legislation are curtailed by an Act similar to the Parliament Act, but as regards other measures provision is made for an agreement to be arrived at first by a joint sitting of both Houses and in the last resort by a double dissolution of both Houses.

Section 60 of the South Africa Act, 1909, provides that the Senate may not amend money bills, but its power to reject money bills is not limited. Article 38 of the Irish Free State Constitution Act, 1922, provides that any bill, unless it be a money bill, may be amended by the Seanad Eireann. Seanad Eireann, like the South African Senate, has apparently power to reject a money bill.

With regard to Bills other than Money Bills amended by the Seanad Eireann, there is a provision similar in principle to section 2 of the Parliament Act of 1911. Article 38 provides that not later than two hundred and seventy days after the Bill has been presented to Seanad Eireann, or such longer period as shall be agreed upon by the two Houses, the Bill shall be deemed to be passed by both Houses in the form in which it was last passed by Dail Eireann.

**Privileges.**—The Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), enables the Legislatures of the Colonies to adopt the law and custom of the English Parliament, including Parliamentary privileges (see p. 37, 46), but it is usual for the Constitution itself to make provision in the matter generally by laying down that the privileges of the Legislature shall be such as are declared by the Legislature, and that until so declared they shall be those of the House of Commons of the United

Kingdom. (Australia Constitution Act, 1900, s. 49, South Africa Act, s. 57.)

This enables the colonial Legislatures, if they think fit, to grant privileges in excess of those of the English House of Commons with the exception of Canada, where by section 18 of the British North America Act, 1867, as amended by the Canadian Parliament Act of 1875 (38 & 39 Vict. c. 38) : “ The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.”

**Power to decide Election Disputes and determine Membership.**  
—By analogy to the House of Lords of the Imperial Parliament, section 33 of the British North America Act, 1867, gave the Canadian Senate power to settle questions respecting the qualifications of Senators, and the House of Commons has by implication a similar power included in the privileges granted to it.

By section 47 of the Australia Constitution Act, 1900, it was provided that until Parliament otherwise provided, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament and any question of a disputed election to either House, was to be determined by the House in which the question arose. By the Electoral Act (No. 19 of 1902) the determination of questions respecting contested elections was transferred to the High Court so that the Australian practice is now similar to the English practice under the Election Petitions Act, 1868 (31 & 32 Vict. c. 125, s. 5).

## CHAPTER VII.

PROBLEMS OF FEDERALISM IN THE BRITISH EMPIRE:  
CHARACTERISTICS OF A FEDERAL FORM OF GOVERNMENT.

The conditions which provoked the union of the American Colonies have been partially repeated in parts of the British Empire and have been partially responsible for the federal form of government in Canada and Australia. The tendencies toward union existed in the American colonies almost from the beginning of their history. Nearly four-fifths of the colonists were of English descent, speaking the same language and, with the exception of the Roman Catholics in Maryland, professing the Protestant religion. In Australia the colonists were similarly united by the ties of common history, language and religion, and were governed by the English system of common law. Whereas the threat of aggression, first from the Indians and then from the Dutch and French and finally from the mother country drove the American colonies into closer union, the advantages to be gained by the Australian colonies by the Federation of 1901 were principally economic and commercial. The incentive for the establishment of the present form of dominion government in Canada under the British North America Act, 1867, was partly to find a solution for the racial difficulties existing in Lower Canada and the possibility of future aggression by the United States which, upon the conclusion of the Civil War in 1865, having become temporarily a first-rate military power, was making extravagant claims to apply the Monroe doctrine and interfere with the internal affairs of the independent states of both North and South America. An additional incentive in the case of Canada was the need for a trans-continental railway and road communications to open out the hitherto unexplored regions of the North-West.

**The Characteristics of a Federal Form of Government (a) :—**

1. Federalism means a treaty between States hitherto independent, *inter se*.

In *Texas v. White*, 7 Wall. 700, the federal system of the U.S.A. was described as “an indestructible union of indestructible States.” The term “indestructible union” carries with it the implication that there is no right of secession. When the Southern States, rather than consent to the taking of office of a Republican President opposed to slavery, claimed to secede from the Union, President Lincoln in 1862 denied the right of secession, and the civil war which followed was, as far as Lincoln’s Government were concerned, fought to assert this principle. In the U.S.A. Constitution it is provided : “Article IV.—The States and the Federal Government. Section iv Guarantees to the States—The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the Executive (when the legislature cannot be convened), against domestic violence.”

Each State enjoys the federal protection of its own government and only a state itself can alter its own constitution. The general powers of legislation are vested in the state Legislatures. The States possess all powers of government except those which their own constitutions, or the federal constitution, explicitly or by plain inference withhold. They are the ordinary governments of the country ; the Federal Government is its instrument only for particular purposes.

The same principle has been observed in making the division of powers between the State and Federal Governments in the Constitution of Australia. The Australia Constitution Act, 1900, s. 106, provides : “The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or at the admission or establishment of the State as the case may be, until altered in accordance with the Constitution of the State.”

Section 107 : “Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this

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(a) See Bryce, “The American Commonwealth,” Vol. I, Chaps. 22 and 23.

Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

Section 119 : "The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."

In the constitution of Canada the principle is not enunciated so clearly. In 1867 there were four provinces, Nova Scotia and New Brunswick, and the two provinces of Ontario and Quebec, formed out of what had been Upper and Lower Canada. The powers of these provincial Legislators are separately described and limited. But the effect of the provisions of sections 58—90 which constitute Part V, " Provincial Constitutions " is that each Canadian province alone can alter its constitution. Those provincial laws in force at the passing of the British North America Act, 1867, are unaffected by the union. Lord Watson in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A. C., at p. 441 (see p. 112), describes the relationship thus : "The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of the constitutional functions, and the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

2. Federalism necessitates a division of sovereignty between the national, or Federal Government, and the State Governments.

In the U.S.A. a citizen owes a double allegiance. He owes a ligiance to the laws of the State where he resides, or is domiciled, and he owes a ligiance to Federal laws wherever he is. Within the British Empire a person may be subject to laws of a State or province where he is resident or domiciled and also within the ambit of laws passed by the central Government, and may owe ligiance to Imperial laws in so far as they apply to a colony. But there is nothing of the nature of a double citizenship. He owes ligiance to the King and as a British subject (*Gavin Gibson & Co., Ltd. v. Gibson*, [1913] 3 K. B. 378; see pp. 98, 111) is incapable of becoming a subject of a colony or dominion. If the Imperial Act conflicts with the colonial Act he must obey the Imperial Act, while the American citizen has to recognise that both the Federal and State Governments have sovereign law-making powers within their respective provinces.

3. The equality of representation of the States in the Federal Legislature.

The equality of the states *inter se* is preserved in the American Constitution by constructing the Federal Legislature on a dual principle. The Lower House (called the House of Representatives) was intended to represent the nation, and consequently the members coming from each State vary in the Lower House according to the population of the State. Under the original provision of the American Constitution (Article 1, section 2), representatives and direct taxes were apportioned among the States according to population. In enumerating the population all free persons were to be counted, including also persons bound to service for a term of years, and excluding Indians not taxed : and including also three-fifths of all other persons. In other words, five slaves were to be counted as equivalent to three white persons in apportionment and levying direct taxes. This was the famous three-fifths rule adopted as a compromise between the Northern and Southern members of the Constitutional Convention. Since the adoption of the fourteenth amendment (1868) the entire number of individuals in each

State (except untaxed Indians) is counted in determining the population entitled to representation.

In the American Senate the States are equally represented by two senators from each State.

Under the Australia Constitution Act, 1900, ss. 24—27, it is provided that the members of the House of Representatives shall number as nearly as practicable twice the number of senators, and the numbers of members chosen from the several States shall be in proportion to the respective numbers of their people. Whether aborigines or other races are to be included in the number is to be decided by whether they are disqualified from voting at elections by the law of any State. If they are disqualified from voting they cannot be included for purposes of claiming an additional quota of members.

Section 7 provides that each of the original States shall be represented by six senators in the Senate. Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several original States shall be maintained and no original State shall have less than six senators.

By section 40 of the British North America Act the various Provinces of Canada were divided into electoral districts and the number of representatives was thus provided for in a schedule. The drift of population to the West and the admission of new provinces has necessitated a redistribution of members every ten years.

Section 22 of the British North America Act, which provided for the composition of the Senate, originally allotted twenty-four members to Ontario, twenty-four to Quebec, twelve to Nova Scotia, and twelve to New Brunswick. Manitoba was admitted in 1871 with three members, British Columbia in 1871 with three members, and Alberta and Saskatchewan in 1905 with a similar number. By the British North America Act, 1915 (5 & 6 Geo. 5, c. 45), s. 1, the number of senators is increased to ninety-six and is not at any time to exceed 104, unless Newfoundland enters the Union, when it can be raised to 110. Ontario has twenty-four, Quebec twenty-four, Nova Scotia ten, New Brunswick ten, Prince Edward Island

four, Manitoba six, British Columbia six, Saskatchewan six, Alberta six. The Federal principle is therefore not observed in the composition of the Canadian Senate. On the other hand, an unwritten convention has grown up that the Dominion Privy Council must contain a proportional number of representatives from the various provinces. All bills must pass both the House of Commons and the Senate, but, in fact, the Canadian Senate has never exercised to any considerable degree its right of veto, and the absence of any machinery for easing a deadlock such as is provided in the Australian Constitution has never been felt. Section 26 provided that upon the recommendation of the Governor-General three or six members might be added to the Senate representing equally the three divisions of Canada. In 1873 the Canadian Privy Council recommended the addition of six members to avoid a deadlock between the Upper and Lower House, which then seemed imminent. The Imperial Secretary of State for the Colonies, however, refused to interfere. By the British North America Act, 1915 (5 & 6 Geo. 5. c. 45), s. 1, the numbers are now raised to four and eight respectively, representing equally the four divisions of Canada. Section 57 of the Australia Constitution Act, 1900, provides that in the event of there being a deadlock between the two Houses, the Governor-General may dissolve both Houses simultaneously. If after such dissolution the House of Representatives again passes the proposed law with or without amendments which have been made, suggested or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives, and the law and its amendments are then carried by an absolute majority at the joint sitting.

The framers of the American Constitution, the writers of the Federalist, Madison, Hamilton and Jay, had partly in mind the British Constitution as it then was. They regarded it as a menace to popular control of the Government for the members of the Executive to be at the same time members of the Legislature and thereby be at liberty to interfere with the free expression of opinion in the House of Representatives. A

similar jealousy of the servants of the Crown had in the past arisen in the English Parliament, which led to the passing of the Act of Settlement, under the provisions of which all placemen and pensioners of the Crown were excluded. Before the Act of Settlement came into force the Place Act made it possible for members of Parliament to accept certain offices then existing under the Crown, provided they sought re-election. The rule did not apply to offices created after the Act, and consequently until 1919 Ministers in the English Parliament who accepted certain of the older offices had to seek re-election. This necessity is now obviated by the Re-election of Ministers Act, 1919 (9 Geo. 5, c. 2). The Executive in America are appointed by the President and are not responsible to either House of Assembly or Senate. The President is indirectly elected by the voters (Article 2, section 1 (i)) and he afterwards chooses his Ministers who do not sit in the Legislature, and neither President nor Ministers can be directly called to account by the Legislature save, as in the case of President Johnson, by the cumbersome process of impeachment. The President on the other hand cannot dissolve the Legislature, and he cannot ensure the passing of bills initiated by him. With regard to a bill which has passed both Houses he may (1) sign it, whereupon it becomes law; (2) he may leave it unsigned and at the end of ten days (excluding Sundays) it becomes law without his signature; (3) in case Congress adjourns before the expiration of the ten days given to the President for the consideration of every bill, he may defeat the measure by refraining from signing it (this is an exercise of what is called his "pocket veto"; (4) he may veto the bill. This last power is not infrequently used.

In contrast to this the Constitutions of the British Dominions by explicit provision or by adherence to constitutional convention require Ministers to be members of the Legislature, and thus to be open to criticism and responsible to the Legislature (see pp. 128-9).

4. The Constitution being an indissoluble contract is the fundamental law of the land and cannot be altered by ordinary legislation.

The original framers of the U.S.A. Constitution intended that it should be supreme, and any act of either the Legislature or the Executive in variance with the provisions of the Constitution should be overruled by the Constitution, the meaning of which was to be interpreted by the Judiciary, and which can be amended only by the special process provided in Article V, Power of Amendment. "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by convenience in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article: and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

There are thus two methods of direct amendment provided: (1) by vote of two-thirds of each House of Congress (the President's approval is not necessary to a proposed constitutional amendment); or (2) by a convention called by Congress on application of two-thirds of the States. Thus far the eighteen amendments which have been made have all been passed by the first method. Congress has never chosen the method of ratification by State conventions. It will be noticed that no amendment inimical to more than one-third of the States is possible, as it cannot get the requisite two-thirds majority in the Senate. The thirteenth amendment which abolished slavery in the United States was thus obtained only as the result of three years' civil war.

But besides the method of direct amendment there are two other processes by which the American Constitution has in fact become modified, namely, by interpretation, that is the construction put upon its terms by the three departments of government, especially the Judiciary, and by the development

of political usages and customs, which although not directly in conflict with its terms, materially modify its spirit and workings. The Supreme Court has uniformly held that the Federal Government possesses not only the powers expressly granted in the Constitution, but also those which are included within, or necessarily implied from powers expressly granted (see pp. 163—4). "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (Marshall, C.J., in *McCulloch v. Maryland*, 4 Wheaton, 316).

The Constitution of the U.S.A. being written and relatively inelastic has not been extended by usage and custom to the same extent as the Constitution of Great Britain, or even the self-governing dominions which have adopted many of the constitutional usages of the Imperial Parliament without direct mention of them in their Constitutions. Nevertheless, there have come to be observed in the Government of the U.S.A. several unwritten laws—for instance, that a President shall not take office for a third time. In the case of important appointments other than Cabinet appointments, the President is generally obliged by custom to confer with the senators and representatives from the State where the appointee lives. In other words, the senators, if of the same political party as the President, claim to control the Federal patronage of their respective States. The Constitution makes no provision for removals from office except by the cumbersome process of impeachment. The question arose early in the history of the U.S.A. whether the consent of the Senate was necessary to the removal of officers appointed with the consent of the Senate. The First Congress adopted the view that the power of removal belongs to the President alone, and this is now the settled rule on the subject. The only reference to Cabinet government contained in the Constitution is in Article II, section 2, paragraph 1, "the President may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." Custom alone has determined that in addition to their duties as administrative

officials, the heads of the various executive departments shall meet with the President as an advisory board popularly known as the Cabinet.

The British North America Act, 1867, contains no special machinery for amendment and therefore cannot be amended without an Act of the Imperial Parliament. The Imperial Parliament has, however, always been willing to pass an accommodating amendment Act whenever there has been shown to be any genuine need for it, *e.g.*, Parliament of Canada Act, 1875 (38 & 39 Vict. c. 38), see p. 37, the British North America Act, 1915 (5 & 6 Geo. 5, c. 45), and British North America Act, 1916 (6 & 7 Geo. 5, c. 19).

The provisions of the Australia Constitution Act, 1900, are more in conformity with the American Constitution, on which they were modelled to provide safeguards for the rights of the constituent colonies. Section 128 provides that any alteration must be first passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law must be submitted in each State to the electors qualified to vote for the election of the House of Representatives, and if in a majority of the States a majority of electors voting approve the proposed law, and if a majority of all the electors approve the proposed law, it shall be presented to the Governor-General for the sovereign's assent. If a constitutional amendment is passed in one House by an absolute majority, but is rejected by the other, a deadlock may be avoided by the exercise of the power given the Governor-General, if the bill is passed a second time within three months, to submit the proposed bill to the electors of the individual States.

The rights of the individual States forming the Australian Federation are thus protected as effectively as under the American Constitution. The Government of South Africa is in no sense Federal in character, and the framers of the South Africa Act, 1909, were not primarily concerned with the safeguarding of the rights of the provincial Legislatures. Section 152 of the South Africa Act therefore enables the South African Parliament to repeal or alter without special process any of the provisions

of the Act, save that amendment of sections 33 and 34 which deal with the number of members to be returned from the original provinces, and the number of electoral districts was not possible until after ten years, and any alteration in the Franchise (section 35) or the recognition of Dutch and English as official languages may not be made without a majority of two-thirds of the total number of members of both Houses sitting together.

5. Federalism involves a distribution of legislative powers, and whatever is not expressly conceded to the Federal Government is reserved to the States. In any true Federal form of government there exist two distinct governmental authorities, the one national and the other State. John Dickinson (b) aptly compared the Federal plan of government of the U.S.A. to the solar system, pointing out that the national Government resembled the sun and the States the planets, each moving in its respective orbit, a deviation from which would imperil the entire system. The powers of Government under the American Constitution may be grouped into five classes :

(a) Those vested exclusively in the national Government. These are set out in Article I, section 8 of the American Constitution.

(b) Those reserved exclusively to the States. These may be taken to be the existing powers of the State Governments in so far as they have not been limited or vested in the national Government.

(c) Those powers generally called concurrent which may be exercised by either the national or State Governments. In this field the States may pass laws which are valid until Congress sees fit to exercise the powers with which it is invested, whereupon the State laws are suspended either wholly or so far as they are inconsistent with Federal Legislature. Thus the States control the subject of weights and measures in the absence of Congressional action, and until the Federal bankruptcy laws were passed each State had its own bankruptcy laws. Counterfeiting is an offence against both Federal and State laws and may be dealt with by State laws until the Federal laws intervene.

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(b) Madison's Papers, Elliot's Debates (2nd ed.), v. 68.

(d) Powers denied the national Government. These are set out in Article I, section 9.

(e) Powers denied the State Governments. These are set out in Article I, section 10.

The Australian Constitution is in this respect, as in many others, more akin to the American Constitution, which may be taken as the true Federal type. Section 51 gives the Federal Parliament exclusive powers enumerated under thirty-nine heads, and section 107 provides : "Every power of the Parliament of a colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be" (see p. 198). And as regards concurrent powers, section 109 provides : "Where the law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

In the British North America Act, 1867, the distribution of powers is on the opposite plan. Section 91 gives the Canadian Parliament exclusive power over subjects enumerated under twenty-nine headings, and section 92 gives the Provincial Legislatures exclusive powers over subjects enumerated under sixteen headings. But section 91, in addition, provides that "it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and in particular it gives the Dominion exclusive powers over subjects enumerated under twenty-nine headings.

The South Africa Act, 1909, s. 59, similarly provides : "Parliament shall have full power to make laws for the peace, order, and good government of the Union," and then section 85 gives powers under thirteen headings to the Provincial Councils. The powers so given are even less expansive than those given to the Canadian Provinces under the corresponding section 92 of the British North America Act, and in addition section 86 of

the South Africa Act, 1909, provides : "Any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any Act of Parliament." Thus provincial government in South Africa has been not inaptly described as "nothing more than gas and water government."

In contrast to section 86 of the South Africa Act, 1909, *cit. supra*, the Federal Legislature in America has no power of control over the legislation of the constituent States of the Union, provided that they are acting within the ambit of their powers. Even if they are not, the President and Congress have no power to veto Acts passed by the State Legislatures. They hold good until a test case is brought, as in the case of *McCulloch v. Maryland* or the *Dred Scott* decision, to the Supreme Court to test their validity. In the past many of the States of America have wilfully defaulted upon their public indebtedness, after which it has been found impossible by threat of diplomatic pressure upon the Federal Government to make them repay what they owe to foreign investors. To prevent similar abuses section 90 was inserted in the British North America Act, which in effect gives the Governor-General in Council in Canada a veto over Acts of the Provincial Legislatures. The draftsmen of the Canadian Constitution seem to have reserved this power to the Governor-General of Canada for two reasons :

(a) It was never intended to give the Provinces a large extension of legislative power and, the Lieutenant-Governors being appointed by the Governor, it seemed proper that the Governor should retain power to overrule their assent to Acts passed by the Provincial Legislatures which were not in accord with the spirit of the Constitution.

(b) Canada had before her the recent example of the abuse of the privilege of autonomy by the American State Legislatures in repudiating the obligations, and the Imperial Parliament intended to protect the credit of the Dominion and the other States then borrowing large sums in London and the other capitals of Europe by giving the Governor-General power to veto any similar measure of repudiation passed by a Canadian Provincial Legislature.

Sir George Cartier distinctly stated during the federation debates in 1864 that the presumption was that the power of disallowance would be exercised in case of unjust or unwise provincial legislation. Sir John Macdonald in 1868, in a memorandum on the subject of disallowance of Provincial Acts, stated that "in deciding whether any Acts of Parliament of a Provincial Legislature should be disallowed, the Government must not only consider whether it affects the interests of the whole Dominion or not, but also whether it be unconstitutional, whether it exceeds the jurisdiction conferred on local Legislatures, and, in cases where jurisdiction is concurrent, whether it clashes with the legislation of the General Parliament."

In the early days of the Federation the doctrine asserted by Canadian Ministers of Justice in recommending the Governor-General to disallow Provincial Acts was that "the Governor-General is intrusted with authority, to which a corresponding duty attaches, to disallow any law contrary to reason or to natural justice or equity." (Draper, C.J., in *Re Goodhue*, 19 Grant.) Subsequent Federal Ministers of Justice have taken the view that they are concerned only with the question of whether an Act is *intra vires*, and cannot concern themselves with the justice or injustice of its provisions. On satisfying themselves that a particular Act is *intra vires* and not opposed to Dominion interests, they have refused to advise the Governor to disallow it. The unfettered power of disallowance still in theory exists, as was shown by the disallowance of the Nova Scotia statute (12 Geo. 5, c. 177) by the ex-Minister of Justice, Sir Loumer Gouin, in October, 1922. Certain property in Nova Scotia had been conveyed by a debtor, Francis J. MacNeil, to his sister, Jane E. MacNeil, without consideration in fraud of the creditors of a firm of which Francis MacNeil was a partner. Francis MacNeil, being hopelessly insolvent when he made the conveyance, the principal creditors obtained a declaration to have the conveyance set aside. The sister was no party to the fraud. She had brought up and educated the younger brothers of her family at considerable expense to herself, and alleged this was the consideration for the conveyance. Having enlisted public sympathy, she and her younger brother fostered an

agitation to have the judgment set aside, with the result that the Legislature of Nova Scotia passed "an Act to vest certain lands in Victoria County in Jane E. MacNeil" notwithstanding the judgment. The creditors then petitioned the Minister of Justice to have the Act disallowed, which he advised the Governor to do, and the Privy Council of Canada concurred in recommending that the Act should be disallowed (c). This decision raised doubts as to what would become of rights acquired under an Act which was subsequently disallowed. In *Wilson and Others v. Esquimalt and Nanaimo Ry. Co.*, [1922] A. C. 202, the Privy Council held that where an Act of a Provincial Legislature is disallowed by the Governor-General under sections 56 and 90 of the British North America Act, 1867, a right of a grantee already acquired under the Provincial Act will not be affected by the disallowance.

6. Just as there is a distribution of legislative powers, so there is a distribution of executive power. In a truly Federal type of constitution the Federal and State executives are quite independent of one another.

The framers of the American Constitution had in mind the immediate problem of the union of hitherto independent States, and the appointment of the Governors and Executive of the States seemed in their time to be naturally a subject in which the President and Congress should have no power to interfere. In later times the unforeseen tendency of politics both in Federal and State government to be dominated by two parties of Republicans and Democrats has meant that in practice a considerable amount of consultation takes place between party leaders in Congress and in the State Legislatures over the appointment of the otherwise independent State Executives.

In the Constitution of Australia the Lieutenant-Governors of the six States are appointed directly by the King on the advice of the Imperial Cabinet as before the passing of the Act, and thus they are independent of the Federal Government. In contrast, under sections 59 and 60 of the British North America Act, the Lieutenant-Governors of the Provinces of Canada are

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(c) See Article, "The Disallowance of Provincial Acts in the Dominion of Canada," by Prof. W. P. M. Kennedy, Journal of Comparative Legislation, vol. 6, 3rd series, p. 81.

appointed by the Governor-General and their salaries are fixed and provided by the Parliament of Canada (see p. 115).

7. Federalism involves a division of Judicial powers. The division of government into two spheres of national and State government necessitates the establishment of two separate systems of Courts: Federal Courts to interpret and administer the Federal laws, and State Courts to interpret and administer the State laws.

In the U.S.A. Constitution, Article 3, section 1, provided that the judicial power of the United States should be vested in one Supreme Court and in such other inferior Courts as the Congress might from time to time ordain and establish, and section 2 describes the subjects over which the jurisdiction of the Federal Courts extends.

In 1891 Congress created nine Circuit Courts of Appeal in order to relieve the Supreme Court of part of its former appellate jurisdiction, so that there are now four grades of Federal Courts—the Supreme Court, the Circuit Court of Appeal, the Circuit Court, and the District Court. Federal Judges are appointed by the President, subject to the confirmation of the Senate, and hold office for life or during good behaviour. They can be removed only by the cumbersome process of impeachment, of which there have been only three instances, and but two convictions, Judge Pickering in 1803 and Judge Humphreys in 1862. The subjects over which the Federal Courts have jurisdiction are conveniently classified under the following nine headings :

(a) Jurisdiction depending on the character of the suit :

(1) Cases in law or equity arising under the Constitution or laws of the United States, or treaties made under their authority.

(2) Cases of admiralty and maritime jurisdiction.

(3) Controversies between the citizens of the same State claiming lands under grants of different States.

Thus in *Re Lee Sing et al.*, 43 Fed. Rep. 359, under the Burlingame Treaty with China, the U.S.A. Government guaranteed to Chinese subjects the same privileges in respect to residence as are enjoyed by the citizens or subjects of the most favoured nation. A municipality passed a law requiring

the Chinese inhabitants to remove to a special Chinese part of the city. The Chinese concerned brought an action in the Federal Courts which declared the municipal ordinance *ultra vires* as opposed to the Treaty.

(b) Jurisdiction depending upon the character of the parties;

(4) Cases affecting Ambassadors, other public Ministers and Consuls.

(5) Controversies in which the United States is a party. These include the trial of criminal offences against the Federal laws.

(6) Controversies between two or more States.

(7) Controversies between a State and the citizens of another State. After the case of *Chisholm v. Georgia* (1798), 2 Dall. 419, the eleventh amendment was added to the Constitution. This makes it possible for a State to sue the inhabitants of another State in the Federal Courts, but the States themselves cannot be sued by individuals in the Federal Courts. In this way the holders of bonds issued by individual States can obtain no remedy in the Federal Courts.

(8) Controversies between citizens of different States.

(9) Controversies between a State or the citizens thereof and foreign States, citizens or subjects.

In the United States there is no Federal common law. In the older States the common law is of English origin by virtue of the original settlement by English colonists, and in the newer States the common law may be English owing to their having been settled by colonists from States where the English common law already obtained. In Louisiana, which was purchased from France in 1803, the common law is French, while in several States upon the Mexican border Spanish family custom is recognised in the State Courts. The organisation of the State Courts is entirely independent of the Federal Judiciary, and the State Judges are appointed by the State Governors. Many civil cases can, nevertheless, be brought at the option of the plaintiff in either a State or Federal Court, or, when brought by the plaintiff in the State Court, may be removed to the Federal Court by the defendant. There is no appeal from the State to the Federal Court when the suit involves purely State law, but if

the Federal Constitution or a Federal law or treaty is involved, and the decision is against the party claiming the right, title, privilege or immunity under Federal law, the case may be appealed to the Supreme Court. If the State Court upholds the Federal law its decision is final. In each State district there is a ~~United~~ States Marshal who enforces the decrees and orders of the Federal Courts, and a Federal prosecutor, the United States District Attorney, who institutes proceedings for the violation of State laws. Marshals and District Attorneys are under the direction of the United States Attorney-General as head of the Department of Justice.

In contrast to this sharp division between Federal and State Judicature made in the U.S.A. Constitution, in Canada under sections 96—101 and 129 of the British North America Act, the Provincial Courts administer Dominion and Provincial law without distinction. The Judges of the Provincial Courts of the Provinces are appointed by the Governor-General, though it is still usual to make the appointments from the local Bars of the respective Provinces. In Canada the whole of the criminal law, including criminal procedure, is reserved to the Dominion (section 91, sub-section 27), while in the U.S.A. there is a division depending upon whether the crime is created by State or Federal law.

In Australia there is a diversity in jurisdiction. Sections 71—80 of the Australia Constitution Act, 1900, provide for the establishment of a Supreme Court, called the High Court of Australia, to hear appeals from the State Courts, and (section 75) the High Court is given an original jurisdiction in all matters (1) arising under any treaty; (2) affecting Consuls or other representatives of other countries; (3) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; (4) between States, or between residents of different States, or between a State and a resident of another State; (5) in which a writ of mandamus or prohibition, or an injunction, is sought against an officer of the Commonwealth.

Section 76 of the Australia Constitution Act, 1900, provides that Parliament may make laws conferring original jurisdiction on the High Court in any matter—

- (1) arising under this Constitution, or involving interpretation :
- (2) arising under any laws made by the Parliament :
- (3) of admiralty and maritime jurisdiction :
- (4) relating to the same subject-matter claimed under the laws of different States.

Under section 77, sub-section 3, Parliament may invest any Court of a State with Federal jurisdiction.

Thus the Australian system is half way between the Canadian and the American system. That is to say, the jurisdiction of the Federal Supreme Court may be limited by Act of the Commonwealth Parliament, and the appointment of the Judges of the State Courts is outside the control of Parliament. But the State Courts may be compelled to administer the Commonwealth laws by Act of the Commonwealth Parliament, whereas the U.S.A. Congress can make no such provision for the administration of Federal law by the State Courts.

8. Federalism means the union of otherwise independent States by a common treaty between them. To safeguard the maintenance of the rights of the individual States, and to secure the rights of the respective parties to the Federal contract, it is the invariable practice to insert in a Federal Constitution certain restraints upon the Federal power, known as "Constitutional Limitations," that is, limitations in the Constitution itself imposed upon the legislative power of the Federal Legislature. Even when exercising powers conceded to it under the Constitution, the Federal Legislature is not to exercise them in such a way as to discriminate against (a) any one State as compared with another, or (b) against the individual citizens of the various States.

Safeguards for the equal treatment of States consist in establishing :—

(a) Equal treatment of States in trade, commerce, and revenue. In Article I, section 9, of the U.S.A. Constitution various limitations are set upon the powers of the United States under eight headings. Sub-section 5 provides : "No tax or duty shall be laid on articles exported from any State," and sub-section 6 : "No preference shall be given by any regulation of commerce

or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." Sub-section 4 provided: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." Under this sub-section the legality of the imposition of a Federal income tax was doubtful. Federal income tax was first levied during the Civil War and was imposed for ten years until 1872. The tax was deemed to be an indirect tax, and hence the rate was made uniform throughout the U.S.A. The income tax not being a direct tax could not be apportioned among the States according to population, but, like an excise or customs duty, had to be levied at a uniform rate. This view was upheld by the Supreme Court in *Springer v. United States* (102 U. S. 586; Thayer's Cases, ii, 1821), in which the Court declared the income tax to be an indirect tax in the constitutional sense. In 1894, to offset the loss of revenue from the reduction in customs dues under the Wilson-Gorman Tariff Act, Congress enacted a second income-tax law, which levied a 2 per cent. tax on all incomes from whatever source in excess of \$4,000. In *Pollock v. Farmers' Loan and Trust Co.* ((1895), 157 U. S. 429; 158 U. S. 601) this graduated tax was declared unconstitutional on the grounds: (1) that a tax upon the income of real or personal property is a direct tax within the meaning of the Constitution, and therefore unconstitutional unless imposed by the rule of apportionment; (2) that a tax upon income from State and municipal bonds is unconstitutional, this being a tax upon the instrumentalities of the State governments. The practical effect of the decision was to make it impossible for the Federal Government to use this form of taxation, since an income tax levied on the basis of population would be highly unjust. Meanwhile the graduated taxes levied by the States had been rendered abortive by the migration of wealthy persons from States where the income tax was high to States where the taxes were low. The practical necessity of enabling Congress to impose a graduated Federal income tax thus led to the making of the 16th Amendment.

Both the Canadian and the Australian Constitutions contain

similar provisions for the safeguarding of the commerce and revenue of the States from interference by the Federal Legislature or Executive. Section 121 of the British North America Act, 1867, provides : " All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." Thus Free Trade is established within the Dominion, and the Dominion Government can make no preference in trade, commerce or revenue as between the provinces. Similarly, section 88 of the Australia Constitution Act, 1900, provided that uniform duties of customs should be imposed within two years of the establishment of the Commonwealth, and such duties were imposed by Act No. 14 of 1902. Section 99 provides : " The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof." And section 114 : " A State shall not without consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

(b) Safeguards for the equal treatment of citizens of the individual States by the Federal Legislature and Executive.— Article I, section 9, sub-section 2, of the American Constitution, provides : " The privilege of writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

And Article IV, section 2 :—

Sub-section 1 : " The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Sub-section 2 : " A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Sub-section 3 : " No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from

such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

The recognition and guarantee of the rights of the individual slave owners in the property in their slaves contained in sub-section 3 made it impossible for the Federal Legislature to abolish slavery, and the decision in *Dred Scott v. Sandford* (1857), 19 Howard, 393, by making it impossible for the Federal Legislature to prevent the extension of slavery into the territories, forced upon the nation the issues of the Civil War. Article XIII now provides :—

Sub-section 1 : "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

The conception of individual rights being above the sovereignty of Parliament is contrary to the British conception of government, and there are no such elaborate safeguards to be found in the constitutions of Australia or Canada. The Federal Legislature in Australia, provided it does not discriminate against the States, can interfere with individual rights, if it so desires. The Australia Constitution Act, 1900, however, contains two examples of restraints on the Legislature in favour of individual rights :—

Section 80 : "The trial on indictment of any offence against the law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

Section 116 : "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Com'nonwealth."

The Constitution of the Irish Free State (see p. 221) contains much more elaborate provisions to safeguard the liberty of the

subject, and Article 8 contains a similar clause guaranteeing freedom of conscience and prohibition of religious discrimination.

9. Federalism, in so far as the citizens of the Federation owe a allegiance to the Federal as well as to the State authority, comprehends the protection of the citizens from the aggression of the State Legislatures and Executives.

The slave population of the Southern States of America were regarded by the framers of the Constitution as a form of property. At a later date a solution for the evils of slavery was sought in either retransplanting the slaves in Africa, for which purpose Liberia was founded, or by paying the slave owners compensation. As a result of the Civil War, Congress proposed on February 1, 1865, the Thirteenth Amendment (*cit. supra*, p. 156) which came into force on December 18, 1865. Thereafter protection had to be given to the former slave population, who thus ceased to be a form of private property and obtained the rights of citizens. The Legislatures of the Southern States were in no hurry to put into effect the constitutional amendment. Those who had been political and military leaders during the recent civil war, as soon as the military dictatorship of the Northern States was removed, urged the State Legislatures to undo the work of the Thirteenth Amendment by passing State laws which in effect would have prolonged the state of slavery which had been abolished. Accordingly, on June 16, 1866, Congress proposed the Fourteenth Amendment, which was declared in force on July 28, 1868. Its intention was to make provision for representation in the House of Representatives and the number of electors to vote for the President and Vice-President of the United States and other executive officers. For the purpose of settling the number of representatives which each State sends to Congress all persons, including negroes but not Indians not taxed, are counted. For the purpose of choosing the electors, who in turn vote for the President, Vice-President and other officers of the Union, the basis of representation is reduced in the proportion in which the total number of male citizens denied a vote in a State shall bear to the whole number of male citizens. The Article also provided for the recognition of the debt of the United States and for the repudiation both by the United States.

and the individual States of the public debts incurred by the Southern States during the Civil War, which is throughout referred to as an insurrection or rebellion. No one who had been engaged in the Civil War might hold any office, civil or military under the United States or under any State, or be a member of the Federal or State Legislatures. Article XIV also provides : " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws." This means that the Southern States may abolish trial by jury if they like, but they cannot discriminate and make trial by jury the form of trial for whites and summary process the form of trial for negroes.

The qualification for voting had been left, by the framers of the American Constitution, to the discretion of the Legislatures. The Southern States after 1865 proceeded to disfranchise the former slave population which otherwise, having become free under the Thirteenth Amendment, would have obtained votes under the laws as they were then framed. To remedy this, Congress, on February 26, 1869, proposed the Fifteenth Amendment which was declared in force on March 30, 1870. It provides :—

" 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

" 2. The Congress shall have power to enforce this article by appropriate legislation."

Thus the States have still control over the qualifications for the franchise. The general rule is that all male citizens may vote if they have attained the age of twenty-one, and have resided in the State for a period varying from six months to two years. In eleven States aliens are permitted to vote providing they have declared their intention of becoming citizens. But in thirteen of the Southern and New England States there are property qualifications and educational tests of ability to read and write the English language which are purposely intended

to disqualify the black population from voting. In several of the Western States the suffrage is withheld from Chinese or persons of Mongolian race. The legality of such procedure is doubtful, but as regards Chinese and Japanese immigrants, since Congress has excluded Chinese, Japanese and Hindoos from citizenship unless they are born in the United States (*d*), the denial of the franchise to them is considered no interference with civic rights on account of colour, as they have never become citizens. In Idaho and Utah special laws were passed aimed at the Mormons restricting the franchise from polygamists. On the other hand, in five States women are permitted to vote on equal terms with men.

In 1867 Canada was not faced by any problem of dealing with coloured races. In Lower Canada the French-speaking population were in a majority and in Upper Canada there was a preponderance of English. The only subject in which the rights of minorities were likely to be overlooked was in the question of giving religious instruction in schools. Section 93 of the British North America Act, 1867, provides that the provinces, although they retain full power to legislate in regard to education, are not to legislate in such a way as to discriminate against one religious denomination in favour of another. The problem of dealing with the immigration and civic rights of Chinese and Japanese, which has aspects similar in some respects to the question of slavery in the United States, is of comparatively recent date and is dealt with on pp. 183—187.

In Australia similarly, the preponderance of the population in all the colonies is of pure English stock and only in the early history of the colonies have there been serious racial differences. The Australia Constitution Act, 1900, provides: Section 127: "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted." The franchise for the Federal House of Representatives is fixed by the State Legislatures, subject to the provisions of section 25, that if

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(d) See "Recent Decisions of the United States Supreme Court Affecting the Rights of Aliens," Prof. W. Garner, *Journal of Comparative Legislation*, vol. 6, 3rd series, p. 210.

persons are disqualified from voting at elections, they shall not be included in the number of voters on the basis of which the quota of representatives to the Federal House of Representatives is fixed. The Australian aborigines are now an almost extinct race, so that their representation has no practical interest in politics. As regards other persons, section 117 provides : "A ~~subject~~ of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

In South Africa there has at all times been a serious problem involved in administering the coloured races. In the Cape Colony the British attitude was more liberal to the coloured races than the Boer policy in the Transvaal and Orange Free State. This radical difference in treatment was in a lesser degree than the treatment of the Outlanders by President Kruger's Government responsible for the South African War. Prior to the Union, in the Transvaal and Orange Free State the franchise was restricted to whites. In Natal it was hedged round with so many restrictions that the black population in fact were seldom able to establish their qualifications. The franchise is now governed by section 35 (i) of the South Africa Act, 1909, which provides that the Union Parliament may prescribe the qualifications which entitle persons to vote at the elections of members of the House of Assembly : subject to the limitation that no such law shall disqualify, by reason of race or colour only, persons who are or may become registered voters under the law of the Cape of Good Hope, unless passed by two-thirds majority of both Houses of Parliament sitting together. No Act has yet been passed by the Union Parliament dealing with the qualification of voters (e). Act No. 12 of 1918 provides

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(e) In June, 1926, General Hertzog introduced his four native bills, which were to take away the vote from the coloured races in the Cape Province, and meantime allot one member in Parliament to be voted for by all the coloured races (excluding Asiatics) in the Union. The native races were also to be represented by seven European representatives, who were not to be allowed to discuss or vote when any measure affecting natives was before Parliament. The Acts, three of which required the majority of two-thirds in a joint sitting, were strenuously opposed by the Senate. See *Times*, June 2, 1926.

for the registration of voters for the House of Assembly and all Provincial Councils, but the qualifications themselves are fixed by the former Acts of the Governments of the respective colonies before the Union. In the Cape Province no distinction is made as regards race or colour. There is an educational test which requires the voter to be able to write his name and address and his occupation, and a £75 occupation, or £50 salary restriction which in practice restricts the franchise to Europeans and the more well-to-do natives.

In Natal Province the franchise is still confined mainly to Europeans. Every male native resident in or possessing the necessary qualification in Natal is disqualified for registration as a voter unless he possesses a certificate from the Governor entitling him to be registered.

Persons who (not being of European origin) are natives or descendants in the male line of natives of countries which had not, prior to May 28, 1896, possessed elective representative institutions founded upon the parliamentary franchise are disqualified to be registered as voters unless possessed of certificates of exemption granted by the Governor-General in Council. In this way the bulk of both the negro and Indian population resident in Natal is disqualified.

In the Transvaal and Orange Free State Provinces residence anywhere in the Union for a period of six months immediately preceding the date of the registration of voters with *bona fide* residence in the electoral division on that date is sufficient, but the franchise is confined to Europeans. To some extent the interests of natives within the Union are safeguarded by the provisions of section 24, under which eight members are appointed to the South Africa Senate, four of whom are to be conversant with the reasonable wants and wishes of the coloured races of South Africa.

The administration of the unsettled native tribes has been to some extent solved by the special machinery provided in section 147, and the reservation of territories for the use of natives (see p. 121), but the competition in industry of the better educated native with the white population has led to the passing of special legislation by the Provincial Governments,

designed to keep natives from working in the mines, railways and certain other trades. (For the legality of such legislation see p. 120.)

Unlike the position in Australia, where the aborigines are practically extinct and their non-representation in Parliament is of no serious importance in politics, the Maori tribes in New Zealand continue to propagate. Under the New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72), it was provided that in the House of Representatives, which consists of eighty members, four should be representatives elected by the Maori races. There are no restrictions upon the Maori franchise for this purpose. They have electoral districts of their own, and both men and women natives vote. Every adult Maori in a Maori electoral district may vote without being registered. Three Maori members are elected to the Council, and the Cabinet usually includes a member of native race or one chosen to represent native interests. Women have equal rights with men in Australia, New Zealand, and in the election of the Dominion Parliament of Canada, and in most of the Canadian Provinces, but not in Newfoundland nor in the Union of South Africa, where although a measure of equal enfranchisement has been introduced, the policy of the Nationalist Party is opposed to the extension.

## CHAPTER VIII.

THE APPLICATION OF THE DOCTRINE OF FEDERAL  
INSTRUMENTALITIES.

At an early stage in the history of the American Constitution the principle was asserted that Congress may not lay a tax upon the agencies or instrumentalities through which the State Governments perform their functions. Thus Congress cannot tax State property, or incomes from State securities, or the salary of a State judicial officer, or the property or revenues of municipalities (a).

Conversely, State Governments may not tax the agents or instrumentalities by which the Federal Government performs its functions, because if allowed this power they might cripple or even wholly defeat the national authority. Hence a State Government may not impose a tax upon the operations of a bank chartered by Congress (*M'Culloch v. Maryland*, 4 Wheaton, 316; *Osborn v. U.S. Bank*, 9 Wheaton, 738), nor upon the salary of a Federal officer, nor upon the evidences of indebtedness issued by the national Government.

The exemption of Federal instrumentalities from State interference, and of State instrumentalities from Federal interference, is in the U.S.A. therefore reciprocal. The doctrine may be described thus: "The scheme of the Constitution being the establishment of separate quasi-sovereign Governments, necessity requires that every power of each must be construed as limited and restricted so as not to impair the independence of the other; one of the implied limitations being that which precludes the State from taxing the agencies (instrumentalities) whereby the central Government performs its

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(a) *Collector v. Day*, 11 Wall. 113; *U.S. v. Railroad Co.*, 17 Wall. 322; *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429.

functions. For otherwise it would be within the powers of the States to cripple the operations of the national Government. Similarly, the national Government cannot tax the agencies of the States Governments, whether by taxation or regulative legislation by one Government over the operations of the other."

In *M'Culloch v. Maryland* (4 Wheaton, 316) the State of Maryland endeavoured to put a tax upon notes issued by a bank incorporated under Federal Charter. Marshall, C.J., put the doctrine then quite shortly : "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission ; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the U.S.A.? We think it demonstrable that it does not."

Similar problems have arisen in the construction of the taxing powers of State and Federal Legislatures in both Canada and Australia. Speaking generally, the Privy Council has never accepted the doctrine as enunciated in the American decisions as applicable to the limitation of Federal and State powers described in either the British North America Act, 1867, or the Australia Constitution Act, 1900. It has in every case looked at the particular facts and given judgment in accordance with what it conceives is the intention and meaning of the Acts. The Australian High Court, on the other hand, at one time did apply the American doctrine very closely, and its decisions were in some cases at total variance with those of the Privy Council for this reason.

#### **Canada: State Interference and Taxation of Federal Instrumentalities.**

In *Bank of Toronto v. Lambe* (1887), 12 A. C. 575, the facts were similar to those in *M'Culloch v. Maryland*, in which Marshall, C.J., originally propounded the doctrine of the immunity of State instrumentalities. The Bank of Toronto had been formed in 1855 by an Act of the then Parliament of Canada. Its head office was at Toronto, but it had an agency at Montreal. In 1882 the Quebec Legislature imposed a tax upon

every bank which carried on business within the Province of Quebec, varying in amount with the paid-up capital and with the number of its offices, whether or not the principal place of business was within the Province. The Bank of Toronto resisted payment of this tax upon grounds that the law was invalid :—

(a) The tax was not a direct tax and therefore outside the powers of the Provincial Government. It was not “direct taxation within the Province in order to the raising of a revenue for Provincial purposes.” (British North America Act, 1867, s. 92, sub-s. 2.) The Privy Council took the view that the tax was a direct tax as described by John Stuart Mill. “A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person on the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs.” The Provincial Legislature had therefore power to impose the tax (b).

(b) It was argued for the bank that such a tax might be made so heavy as to defeat the Dominion power to deal with banking and the incorporation of banks under section 91, subsection 15, and the dictum of Marshall, C.J., in *M'Culloch v. Maryland*, “the power to tax involves the power to destroy,” was cited with the other American authorities (at p. 579). The doctrine of the immunity of Federal instrumentalities was decisively rejected by the Privy Council on the ground that it was contrary to the whole principle of English constitutional law, namely, the sovereign powers of the Legislatures. Lord Hobhouse described the principles upon which the Privy Council should construe the British North America Act thus: “Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole

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(b) Conversely in *Cotton v. The King*, [1914] A. C. 176, a Quebec succession duty Act of 1906 was held *ultra vires* as not being a direct tax because it imposed a duty on property outside the Province; but a succession duty “on all transmissions within the Province owing to the death of a person domiciled therein of movable property locally situate outside the Province at the time of such death” was held *intra vires* as a direct tax: *Burland v. The King*, [1921] 1 A. C. 215.

field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

The judgment was applied also to insurance companies, which were also held liable to similar Provincial taxation, although created under Federal legislation.

Similarly, in *Francis C. Abbott v. The City of St. John* (1908) 40 Supreme Ct. of Canada Cases, 597) the appellant was an official in the customs service of the Dominion Government who had been assessed to a Provincial income tax by the authorities of the City of St. John, New Brunswick. He applied for a writ of *certiorari* to quash the assessment on the grounds that the British North America Act, 1867, confers no power upon a municipality to impose such a tax. Similar cases had arisen before, and in *Leprohon v. The City of Ottawa* (2 Ont. A. R. 522) it had been held, applying the American doctrine of the immunity of Federal decisions and the similar decisions of the Australian High Court, that Provincial Legislatures could not tax the salaries of Federal officers, and this had been looked upon as the settled law for twenty years. In 1907, however, the Privy Council in *Webb v. Outrim* ([1907] A. C. 81, see p. 189) had held that an income tax imposed by the State of Victoria upon the salary of a member of the Commonwealth Parliament was valid, and the Supreme Court of Canada followed the decision of the Privy Council and held the municipal income tax *intra vires* the municipality. (Girouard, J., dissenting, held that the decision in *Webb v. Outrim* was not binding on a Canadian Court.)

Apart from taxation there have been other cases of interference of the Provincial Legislatures with companies formed

under Federal laws. The Privy Council has in each case looked at the nature of the undertaking and the nature of the interference, and where it could be only inferred that the interference amounted to an attempt to curtail the legislative powers of the Federal Government, it has disallowed such Acts. Thus in *John Deere Plow Co. v. Wharton*, [1915] A. C. 330, the appellant company was incorporated by letters patent under the Dominion Companies Act (R. S. Can. 1906, c. 79). Part VI of the Companies Act of British Columbia provided that companies incorporated under the Dominion Parliament should be licensed or registered under that Act as a condition to carrying on business in the Province or maintaining proceedings in its Courts. A shareholder of the John Deere Plow Co. brought an action claiming an injunction to restrain the company from carrying on business within the Province without being licensed as required by the Act. Section 92, sub-section 11 of the British North America Act gives the Provincial Legislatures express authority over the incorporation of companies with provincial objects. Section 91, sub-section 2 gives the Parliament of Canada general powers for the regulation of trade and commerce. The Privy Council, *per* Haldane, L.C., held that the effect of the provisions of the Provincial Act was to prohibit companies from taking proceedings in the course of their business unless licensed under the Provincial Act. It also imposed penalties on a company and its agents if, not having obtained a licence, it carried on the company's business in the Province. The Provincial Act therefore struck at capacities which were the natural and logical consequences of the incorporation by the Dominion Government of companies with other than Provincial objects, and to this extent its provisions were invalid.

In *Great West Saddlery Co. v. The King*, [1921] 2 A. C. 91, the facts were very similar to those in *John Deere Plow Co. v. Wharton*, which was discussed and applied. The appellant company had been incorporated under the Companies Act of Canada (R. S. Can. 1906, c. 79) with power to trade in any Province. Ontario, Manitoba and Saskatchewan in 1914, 1913 and 1915 respectively had passed Provincial Acts which purported to preclude such Dominion companies from trading in

those Provinces unless they were registered and licensed under the Provincial Acts in question. The necessary licences could not be withheld at discretion, as was provided under the Companies Act of British Columbia, held invalid in *John Deere Plow Co. v. Wharton* and it was argued were in the nature of a receipt that the company had complied with all legislative requirements. The Privy Council held that those provisions in the Acts which provided for registration amounted to sanctions for the enforcement of the Acts, which if applied would sterilise or destroy the capacities and powers which the Dominion had validly conferred, and were to that extent invalid, but that the provisions in the Ontario Act, which provided that the companies could not acquire and hold lands in the Province without a licence under the Provincial Mortmain Act, were valid, but the similar provisions in the Manitoba and Saskatchewan Acts were invalid, since they were not severable from the invalid provisions.

The Provincial Legislatures have likewise several times attempted to drive Dominion insurance companies out of competition with Provincial companies. Insurance companies formed under Provincial laws have their operations necessarily restricted to the Province in which they are incorporated. They naturally resent the competition of companies formed under Dominion laws and foreign companies which can transact business anywhere in the Dominion. They have therefore at various times put pressure upon their Provincial Legislatures to enact laws intended to penalise the activities of the Dominion and foreign companies. Thus as far back as 1873 the Dominion of Quebec passed a licensing Act which did not compel insurance companies to pay for a licence when it was taken out, but enacted that every assurer carrying on business in Quebec, other than that of marine assurance, should be bound to take out a licence each year, and the licence should be in proportion to the amount of business done, in so far as any person effecting a policy of insurance should be obliged to stamp it with an adhesive *ad valorem* stamp. In *Att.-Gen. for Quebec v. The Queen Insurance Co.* (1878), 3 A. C. 1090, this Act was held invalid as being of the nature of a stamp duty, and not a direct tax

or licensing duty within section 92, sub-sections 2 and 9 of the British North America Act.

In *The Citizens Insurance Co. v. Parsons* (1881), 7 A. C. 96, the Privy Council was asked to decide the validity of an Act of the Ontario Government, which specified that certain conditions were to form part of any policy of insurance, and that the Act was to apply to all companies whether formed under the Dominion Act or under foreign companies Acts, and that such companies were not entitled to do business unless they were registered under the Act, registration being refused unless they complied with its provisions as to conditions in policies issued by them. It was held that in the circumstances the Act was valid as coming within the powers granted under section 92, sub-section 13 relating to "property and civil rights in the Province."

#### Canada: Federal Interference with State Instrumentalities.

Cases of direct interference by the Dominion Parliament with State instrumentalities by way of taxation have not been particularly numerous. The most notable recent instance has been *Att.-Gen. for British Columbia v. Att.-Gen. for Ontario (Intervenant)* (1923), 40 T. L. R. 4. In that case a cargo of Johnny Walker black label whisky had been sent in the name of His Majesty in right of the Province of Ontario for the use of certain State institutions within the Province. The Dominion collector of customs refused to hand over the whisky until the Dominion customs duty had been paid upon it. Section 125 of the British North America Act provides: "No lands or property belonging to Canada or any Province shall be liable to taxation." It was held that this section does not oust the power of the Dominion Parliament to impose customs or excise duties or sales tax on goods when they enter the Dominion, although they are the property of one of the Provinces, inasmuch as section 125 must be construed in the light of section 91, which provides that the Dominion shall enjoy exclusive legislative authority over the regularisation of trade and commerce and raising of money by any mode or system of taxation. (It must be noticed, that the decision of the

Australian High Court in *R. v. Sutton* (1908), 5 C. L. R. 789, where the facts were very similar, was followed by the Privy Council in the above case, see p. 191.)

The main subject of controversy has been the claim of the Dominion Government to impose a system of registration both of Dominion and Provincial insurance companies. In *Att.-Gen. for Canada v. Att.-Gen. for Alberta*, [1916] 1 A. C. 588, the Dominion Government, by the Dominion Insurance Act, 1910, s. 4, had provided that no company or association of underwriters should accept any risk or issue any policy of insurance unless it had first taken out a licence from the Dominion Government. Section 12 provided that no licence was to be granted to any association of individuals unless it was formed on the plan of Lloyd's. Section 70 provided that any contravention of section 4 should be punishable for a first offence by fine, and for a second or subsequent offence by imprisonment with hard labour. It was held that the Act was *ultra vires* the Parliament of Canada, since the authority conferred by the British North America Act, s. 91, sub-s. 2, to legislate as to "the regulation of trade and commerce," does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the Provinces, and it could not be enacted under the general power conferred in section 91 to legislate for the "peace, order and good government" of Canada, as it trespassed upon the legislative authority conferred on the Provinces by section 92, subsection 13, to make laws as to "civic rights in the Province." The principle in *Russell v. The Queen* (1882), 7 A. C. 829, was confirmed by the Privy Council as established, but they pointed out it should be applied with caution. That is to say, supposing the state of the insurance business in Canada necessitated such an Act being passed, the validity of the Act might be justified on the same grounds of public expediency as the Canadian Temperance Act, 1878 (see p. 174).

The Dominion Insurance Act, 1910, having to this extent failed to attain its object, the Dominion Parliament passed a new Act, the Insurance Act of Canada, 1917 (7 & 8 Geo. 5, c. 29), which enabled the Minister of Finance to grant licences

to companies incorporated under Dominion and under Provincial law to do certain kinds of insurance business. Before a licence would be issued companies had to comply with certain conditions with regard to the payment of rates of wages of agents, salaries of directors and commissions and allowances. Section 12 of the Act made it unlawful for any British company or any British subject not resident in Canada to immigrate into Canada for the purpose of establishing any office or agency for the transaction of any business relating to insurance. The position under the Act was therefore that existing Dominion and Provincial companies or existing foreign companies on obtaining a licence under the Act were to be deemed for the purpose of the Act incorporated under the authority of the Dominion Parliament and free to do business. New British companies could not however open agencies, and unincorporated persons in the Provinces also could not obtain a licence and were thus subject indirectly to penalties. The Act itself said nothing about what would happen to existing companies which carried on business without a licence, but penalties were imposed by inserting an amendment in section 508 (c) of the Criminal Code, making it an indictable offence punishable with fine or imprisonment to carry on insurance business without the necessary licence. In the earlier Act, 1910, which had been declared invalid by the decision in *Att.-Gen. for Canada v. Att.-Gen. for Alberta*, the penalties by which the Dominion sought to make its legislation effective were contained in the Insurance Act itself. In the Insurance Act, 1917, the Dominion Parliament intended to get round the decision by an *ad hoc* amendment in the Criminal Code, nothing in which, however, was to apply to Provincial companies incorporated under Provincial law.

In 1922 the Ontario Legislature passed the Reciprocal Insurance Act, which authorised any person to exchange through the medium of an attorney, with persons, whether in Ontario or elsewhere, reciprocal contracts of insurance, subject to provisions as to licences and other conditions; and it was provided that actions in respect of such contracts might be maintained in the Courts of the Province. Before the Act came into force the Lieutenant-Governor of Ontario (*Att.-Gen. for Ontario v.*

*Reciprocal Insurers*, [1924] A. C. 328) referred threeé separate questions to the Supreme Court of Ontario :-

Question 1.—Is it within the legislative competence of the Legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922? To this the Privy Council on appeal answered in the affirmative.

Question 2.—Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of sections 508 (c) and 508 (d) of the Criminal Code as enacted by chapter 26 of the Statutes of Canada (7 & 8 Geo. 5) in the absence of a licence from the Minister of Finance issued pursuant to section 4 of the Insurance Act of Canada (7 & 8 Geo. 5, c. 29)? To this the Privy Council answered in the negative, on the grounds that masking the penalty by which the insurance legislation was to be enforced under a so-called amendment of the criminal law did not alter the essential character and objects of the legislation, the essence of which was not criminal at all. Secondly, the proviso purporting to save the right of Provincial companies still left individuals (unincorporated associations) in the Provinces subject to the Dominion Act.

Question 3.—Would the answers to questions one or two be affected, and if so how, if one or more of the persons subscribing to such reciprocal insurance is (a) a British subject not resident in Canada immigrating into Canada? (b) an alien? To this the Privy Council answered in the negative, but did not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact sections 11 and 12, sub-section 1, of the Insurance Act of 1917. The Insurance Act was in no sense a bill exercising jurisdiction over immigration and aliens, coming within section 91, sub-section 25, but as the question was not submitted they did not think it advisable to express an opinion upon it.

In *Abbott v. The City of St. John* (1908), 40 S. C. R. 597, *cit. supra*, p. 166, it had been decided that a Province may assess

the salary of a Dominion official to Provincial income tax. In *Caron v. The King*, [1924] A. C. 999, it was held that the salary of a Provincial Minister was likewise liable for payment of Dominion income tax. The appellant was Minister of Agriculture in the Government of the Province of Quebec, and the action was one on the information of the Attorney-General for Canada to recover \$210 in respect of income tax under the Income War Tax Act, 1917, and amending statute of 1919, in respect of his salary of \$6,000 as Minister and as member of the Legislative Assembly. The tax was a general income tax valid under section 91, sub-section 3, and the Privy Council, applying the reasoning in *Abbott v. The City of St. John*, held that though the Parliament of Canada could not exercise its power so as to destroy the capacity of officials appointed by the Province, the Income Tax Acts not being discriminating statutes, but imposing on all citizens contributions according to their annual means, without having regard to the source from which their annual means were derived, the salary of the Minister was validly assessed.

#### **Other instances of Conflict between Federal and State Powers.**

—In Canada conflict between the exercise of powers invested in the Federal Government and powers vested in the Provincial Legislatures has arisen mainly out of the vexed questions of liquor control and the disinclination of certain Provinces to allow Orientals to settle within their areas.

Under section 91 of the British North America Act, 1867, power is given first in general terms to the Canadian Parliament to make laws for the “peace, order and good government of Canada,” and then special matters included are set out under twenty-nine headings. Section 92 gives the Provincial Legislatures power over certain specified subjects, among which sub-section 9 mentions “Shop, Saloon, Tavern, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes”; sub-section 13: “Property and civil rights in the Province”; and sub-section 16: “Generally all matters of a merely local or private nature in the Province.” As the British North America Act had not conferred special power of

temperance legislation on the Dominion, the general opinion of Dominion legislators was that a Dominion Act which did nothing more than deal with sobriety was within the powers of the Dominion Parliament to legislate for the "peace, order and good government of Canada." Such Dominion laws were obviously bound to remain ineffective unless there were proper sanctions to enforce them, while efforts of the Provincial Legislatures to keep their areas "dry" were defeated by the possibility of getting liquor from neighbouring Provinces. The Dominion Government therefore sought to enforce a uniform drink policy throughout Canada, but meanwhile the Provincial Governments had passed numerous Acts governing the licensing of saloons, police regulations, hours of opening and closing, etc., which came into conflict with the provisions of the Dominion Acts.

In *Russell v. The Queen (on the information of John Woodward)* (1882), 7 A. C. 829, the validity of the Canada Temperance Act, 1878, was challenged on the ground that it encroached on Provincial powers under section 92, sub-section 9 as to tavern licences; sub-section 13, property and civil rights; and sub-section 16, matters generally of a local nature. The Act in effect, wherever throughout the Dominion it was put in force, uniformly prohibited the sale of intoxicating liquors, except in wholesale quantities or for certain specified purposes; regulated the traffic in the exceptional cases; and made sales of liquor in violation of the prohibitions and regulations contained in the Act criminal offences punishable by fine, and for the third and subsequent offences by imprisonment. The preamble to the Act recited, "it is very desirable to promote temperance legislation in the Dominion, and that there should be uniform legislation in all Provinces respecting the traffic in intoxicating liquors." Charles Russell had been convicted at Fredericton before a police magistrate for the offence of selling liquor contrary to the Act, and appealed by writ of *certiorari* to the Supreme Court of New Brunswick and thence to the Privy Council. The Privy Council (*per* Sir Montague E. Smith), reversing the judgment of the Supreme Court of New Brunswick, held that the Canadian Temperance Act was valid on the grounds that the objects of

the Act were general, *viz.*, to promote temperance by a uniform law throughout the Dominion. The exercise of this power related to the "peace, order and good government of Canada," and not to the class of subjects included as "property and civil rights."

In *Hodge v. The Queen* (1883), 9 A. C. 117, the Privy Council was asked to consider the converse situation where a person, Archibald G. Hodge, was convicted before a police magistrate, under the Ontario Liquor License Act of 1877, for allowing a billiard table to be used in his hotel in Toronto during prohibited hours and fined \$20 and \$2.85 costs or fifteen days' hard labour. He appealed to the Court of Queen's Bench of Ontario which quashed the conviction. The case was then taken to the Court of Appeal for Ontario, which affirmed the conviction, and thence to the Privy Council. The grounds of appeal to the Privy Council were that the Ontario Liquor License Act, 1877, was invalid as it encroached on the sphere of the Dominion Temperance Act, 1882, and the powers of the Dominion Parliament under the British North America Act, 1867, s. 91, sub-s. 2, which gives the Canadian Parliament power to pass laws for the "regulation of trade and commerce."

The Privy Council declared the Ontario Liquor Act, 1877, valid; it dismissed the appeal and confirmed the conviction on the grounds that the Act in so far as it made under sections 4 and 5 regulations for the good government of taverns did not interfere with "the general regulation of trade and commerce." The fact that the Dominion Government had passed a Temperance Act of its own did not necessarily invalidate provincial legislation in a similar matter, because subjects which in one aspect and for one purpose fall within section 92 (provincial powers), may in another respect and for another purpose fall within section 91 (dominion powers). In this particular case the provincial legislation might be regarded as coming within section 92, sub-section 8 : "Municipal Institutions in the Province," or alternatively, sub-section 16 : "Generally all matters of a merely local or private nature in the Province."

Authority to make regulations under the Ontario Liquor Act, 1877, had been intrusted to a Board of Commissioners, and this

delegation of authority was held to be within the powers conferred upon the Provincial Governments.

In *Att.-Gen. of Ontario v. Att.-Gen. for the Dominion and the Distillers and Brewers' Association of Ontario* (generally called "the Local Prohibition Case"), [1896] A. C. 348, the Privy Council was asked to consider how far a Dominion Temperance Act could repeal an existing Provincial Act, and in so far as it could not repeal it, how far its provisions in conflict with the Provincial Act were valid.

In 1886 the Dominion Parliament had passed a Canada Temperance Act which provided for local option as regards liquor traffic. That is to say, municipalities in any part of the Dominion might by local option adopt the provisions in the second part of the Act which made it "unlawful for any person by himself, his clerk, servant or agent to expose or keep for sale, or directly or indirectly, on any pretence or upon any device, to sell or barter or in consideration of the purchase of any other property, give to any other person any intoxicating liquor." Certain relaxations were made in the case of sales of liquor for sacramental or medical purposes, or for exclusive use in some art, trade, or manufacture, and the Act was not to apply to manufacturers, wholesale importers and traders who sold liquor in large quantities to persons who would forthwith carry their purchases beyond the limits of the county or city. In other words a municipality by adopting the Act could enforce total prohibition within its area. In Ontario the liquor trade was at that time governed by the Upper Canada Temperance Act, 1864, passed by the Legislature of Upper Canada before the Union, but still in force. The Canada Temperance Act, 1886, would therefore have allowed the Governor-General of Canada to extend its provisions by Order in Council to any part of the Dominion where a municipality had voted for its adoption and thus put the question of prohibition outside the control of the Provincial Legislatures.

The Privy Council seems to have recognised that their decision in *Russell v. The Queen* (*cit. supra*) had gone too far and now began to narrow its construction of section 91, describing the powers of the Canadian Parliament. The Privy

Council upheld the provincial legislation and laid down the principle that the general power of legislation conferred upon the Dominion Parliament by section 91 of the British North America Act, 1867, in supplement of its enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench upon any of the subjects enumerated in section 92, as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion. Dominion enactments, when competent, override but cannot directly repeal provincial legislation. When they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or Provincial Legislature.

In other words the concluding words of section 91, "peace, order and good government" refer only to the twenty-nine enumerated subjects of the Dominion powers, and the Dominion cannot take advantage of these concluding words to encroach upon the subjects enumerated under section 92 which are vested in the Provincial Legislatures. The Canadian Government can legislate in regard to matters not enumerated in section 91 only if such matters are unquestionably of national interest and importance, and it ought not to encroach upon the subjects specifically enumerated in section 92. The Privy Council affirmed their previous decision in *Russell v. The Queen*, but pointed out that the principle embodied in it must be applied with great caution. "If it were conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate to the exclusion of the provincial legislatures" (*per* Lord Watson, at p. 361). In *Att.-Gen. of Manitoba v. Manitoba Licence-Holders' Association*, [1902] A. C. 73, the Manitoba Liquor Act, 1900, was held *intra vires* and valid notwithstanding that in its practical effect it interfered with the Dominion revenue; and in

*Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A. C. 417, the British Columbia Prohibition Act, 1916, was similarly held *intra vires* and valid although it gave the police extraordinary powers of search and detention of papers.

Section 91, sub-section 27 of the British North America Act, 1867, gave the Dominion Parliament power over "Criminal law except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." If this section gave the Dominion exclusive powers over all forms of penal enactment it would virtually mean that all Provincial legislation would be abortive because penalties provided in such Provincial Acts to insure their observance would be invalid as encroaching upon the Dominion powers. Thus in *R. v. Wason* (1890), 4 Cartwright, 578, a Provincial Act making it a criminal offence with imprisonment to supply adulterated milk to cheese factories was questioned as being an encroachment of the Dominion powers over criminal law. The Supreme Court held that the Act was valid because it merely supplemented a power under section 91, sub-section 16, which the Province might validly exercise, and the case was not taken further.

In *Att.-Gen. of Ontario v. Hamilton Street Railway*, [1908] A. C. 524 (commonly called the "Lord's Day Case") the Privy Council was asked to consider a series of questions relating to a similar apparent overlapping of powers conferred upon the Dominion Government in respect of the criminal law and the general powers given the Provinces in section 92, sub-section 16: "generally all matters of a merely local or private nature in the Province." The Ontario Legislature had passed an Act intituled "An Act to prevent the Profanation of the Lord's Day," which forbade work on Sundays and enacted various penalties on persons who employed workmen on Sundays. Some half-dozen railway, dock and shipping companies were directly concerned with the legality of the legislation, and the Hamilton Street Railway Co. was accepted as the respondent representative of the others.

The appeal was brought in the form of a series of questions which had been referred by the Lieutenant-Governor to the Court of Appeal for Ontario.

The Privy Council declared the Provincial Act "to prevent the Profanation of the Lord's Day" invalid. The criminal law in its widest sense is reserved by section 91, sub-section 27, for the exclusive authority of the Dominion Parliament, and the Provincial Act was an infraction of the legislative authority of the Canadian Parliament over the criminal law. The Act in question being held by the Privy Council to be invalid and *ultra vires* the Ontario Legislature, their Lordships refused to answer the remaining questions on the ground that it was not their practice to give speculative opinions on hypothetical questions submitted. Questions which they were prepared to answer must arise in concrete cases and involve private rights.

As the result of agitation of religious bodies in Canada, principal among which is the Lord's Day Alliance of Canada, the Lord's Day Act, 1906, was passed which made it punishable to conduct Sunday excursions "except as provided by any provincial Act or law now or hereafter in force." In 1923 Manitoba passed such an Act permitting the railways to run Sunday excursions, and in *Lord's Day Alliance of Canada v. Att.-Gen. of Canada*, [1925] A. C. 384, the Privy Council was asked to decide whether the Manitoba Act was invalid as an encroachment of the Dominion powers over crime under section 91, sub-section 27. The Privy Council held that as Sunday excursions were not illegal under the laws of England existing in 1870, which became part of the law of Manitoba by 51 Vict. c. 33, the Manitoba Act was merely permissive and did not deal with a matter brought within the criminal law.

The actual position resulting from the decisions in *R. v. Wason* and the Lord's Day cases appears to be this:—

1. To what extent does Dominion legislation bringing particular conduct within the criminal law prevent Provincial legislation in reference to such conduct?

Answer: It depends on the subject of such legislation. If the Dominion Act is in the interests of public morality in all parts of the Dominion the statute passed by the Provinces is to that extent overruled. But, if the Dominion legislation is not primarily for the preservation of public morality, it cannot be called criminal law and cannot exclude Provincial legislation.

2. Conversely, in regard to Provincial legislation, if a Provincial Legislature passes an Act providing imprisonment as a penalty for an offence against an Act which it has clearly power to enact, is such an Act an invasion of the criminal law?

Answer: No, because the object of the Act is not to create new offences but to deal with one or other of the subjects assigned to the Provinces under section 92. If the object is any of those enumerated under section 92 as assigned to the Provinces, the mere fact that the Provincial Legislature has imposed a penalty does not convert the penalty into a crime which was not a crime before.

The case of *Russell v. The Queen* is still regarded by the Privy Council as good law, but for reasons that were probably never in the mind of Sir E. Montague Smith when he delivered judgment in 1882. The Privy Council now looks at the character of the legislation of the Dominion Parliament and the emergency or otherwise of the occasion when it was passed and allows it to pass as valid under the exercise of the power of the Dominion over "peace, order and good government" only if the exigencies of the times merit its enactment. This was the principle applied in deciding *In re The Board of Commerce Act*, 1919, and the *Combines and Fair Prices Act*, 1919, [1922] 1 A. C. 191. The Privy Council there held that the Combines and Fair Prices Act passed by the Canadian Parliament was invalid. The Canadian Act, which was the equivalent of the English Profiteering Act, prohibited the formation of such trade combinations for production and distribution in the provinces as the Board of Commerce might consider detrimental to the public interest. The Board was given power, also, to restrict accumulation of food, clothing and fuel beyond the amount reasonably required, in the case of a private person for his household, and in the case of a trader for his business, and the Board might order the surplus to be offered for sale at fair prices and the Board could attach criminal penalties for breaches of the Act. The Privy Council held the Acts *ultra vires* on the grounds that they interfered seriously with "property and civil rights in the Provinces," reserved to the provinces under section 92, sub-section 2, and were not passed in any highly exceptional circumstances, such as

war or famine, which conceivably might render trade combinations and hoarding subjects outside the heads of section 92 and within "peace, order and good government" in section 91. The power of the Dominion Legislature to pass the Acts in question was not aided by section 91 since they were not within the general power: nor by section 91, sub-section 27 (criminal law), because the matter did not by its nature belong to the domain of criminal jurisprudence.

Conversely, in *Fort Frances Pulp and Power Co. v. Manitoba Free Press*, [1923] A. C. 695, an Order in Council made under the Canadian War Measures Act, 1914 (the equivalent of the English D.O.R.A.), whereby the supply and price of newsprint paper was controlled, and an Act of the Dominion Government passed after the cessation of hostilities for continuing the control until the declaration of peace, were held *intra vires* on the grounds that the Dominion Parliament has implied power to deal with a great emergency, such as that arising from war, although in so doing it trenches upon property and civic rights in the Provinces from which subjects it is excluded in normal circumstances. The Dominion Government, which in its Parliament represents the people of Canada as a whole, must be deemed to be left with considerable freedom to judge whether a sufficiently great emergency exists to justify an exercise of the power.

In *Toronto Electric Commissioners v. Snider*, [1925] A. C. 396, the Dominion Parliament had passed the Industrial Disputes Investigation Act, 1907, which provided that, upon a dispute occurring between employers and employees in any of a large number of industries in any part of Canada, the Minister for Labour for the Dominion might appoint a Board of Investigation and Conciliation. The Board was to make investigations, with power to try to bring about a settlement: if no settlement resulted, they were to make a report with recommendations as to fair terms, but the report was not binding upon the parties. After a reference to a Board, a lock-out or strike was to be unlawful and subject to penalties.

In 1914 the Provincial Legislature of Ontario passed a Trade Disputes Act which substantially covered the whole of the

matters included in the Dominion Act excepting in minor particulars, one of which was that it did not interfere with the right to lock-out or strike during the course of an inquiry.

In 1923 a dispute arose between the Toronto Electric Commissioners and their workmen and the dispute was referred to a Board of Conciliation appointed by Mr. Snider, the Dominion Minister of Labour. The Toronto Electric Commissioners then commenced an action in the Supreme Court of Ontario for an injunction to restrain the proceedings on the allegation that the Dominion Act was *ultra vires*. The Attorneys-General of Canada and of Ontario were notified and made parties as intervenants.

The Supreme Court of Ontario held that the Dominion Act was *intra vires* upon the three grounds :—

- (a) That it dealt with a regulation of trade and commerce and thus came within the powers vested in the Dominion under section 91, sub-section 2.
- (b) That it came within the general terms of “ peace, order and good government.”
- (c) That it came within the ambit of the criminal law under section 91, sub-section 27.

The Privy Council (*per Viscount Haldane*) reversed the decision and declared the Dominion Act *ultra vires* on the following grounds :—

(a) The general powers of the Dominion Parliament under section 91 cannot extend to subjects assigned to the provinces under section 92, unless the Dominion enactment falls under the twenty-nine heads specifically assigned to the Dominion Parliament.

(b) The mere fact that penalties are attached to Dominion legislation will not suffice to make that legislation criminal law and thereby bring it within the Dominion powers, if the penalties in question are merely auxiliary and the main object is something specifically intrusted to the Provincial Government.

(c) The words “ peace, order and good government ” would certainly authorise the Dominion Parliament to pass war legislation but cannot be regarded as dealing with matters of (1) emergency, or (2) general Canadian interest and importance,

or (3) with a power conferred under any of the enumerated heads in section 91.

The decision in *Russell v. The Queen* (7 A. C. 829) must therefore be distinguished by saying that liquor legislation in 1878 was a subject of paramount national importance while labour legislation in 1923 was not.

The other subject on which there has been a considerable conflict between Dominion and Provincial powers has been over the admittance of aliens. Both the Dominion Parliament and the Provincial Legislatures have passed Acts or made Regulations at various times restricting the employment of Orientals in certain trades and occupations. Employers finding it profitable to employ Japanese or Chinese have sought to impugn the validity of these Acts as being an encroachment of Dominion or, alternatively, of Provincial powers. In the first important case of this kind, *Union Colliery Co. of British Columbia v. Bryden*, [1899] A. C. 580, the Provincial Legislature of British Columbia had passed in 1890 an Act intituled "The Coal Mines Regulation Act, 1890," which prohibited the employment of Chinamen of full age in underground coal mines. The Act contained provisions prohibiting the employment of boys under twelve and women of all ages, but the main object was less to protect children and women from working in collieries than to prevent the competition of Chinamen, whether naturalized or aliens, from working in the mines in competition with Canadian miners. The Union Colliery Co. employed Chinamen in their mines, and Bryden, a shareholder in the company, applied for a declaration that the company had no right to employ Chinamen in certain positions of trust and responsibility and sought an injunction restraining the company from employing Chinamen contrary to the statute law in the Province.

The company pleaded in its defence the invalidity of the Act as being *ultra vires* the Province of British Columbia.

The Privy Council (*per* Lord Watson) held that the Act was *ultra vires* the Provincial Legislature. Regarded merely as a coal-working regulation it might be within section 92, sub-section 10 (powers over local works and undertakings, etc.), or, under section 92, sub-section 13, "Property and civil rights in

the Province.” But that its exclusion of Chinamen whether aliens or naturalized was in conflict with the Dominion power given in section 91, sub-section 25 over naturalization and aliens, and was therefore invalid.

In *Cunningham v. Tomey Homma and Att.-Gen. for the Dominion of Canada*, [1903] A. C. 151, the Province of British Columbia had passed the British Columbia Provincial Elections Act, 1897, section 8 of which provided that no Japanese, whether naturalized or not, should be entitled to vote. Tomey Homma, a native of the Japanese Empire but a naturalized British subject living in Vancouver City, in 1900 claimed a vote and appealed from an order of the collector of voters refusing to place his name on the register. Section 91, sub-section 25, gives the Dominion Parliament power over naturalization and aliens; and section 92, sub-section 1, the Provinces power over “The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.”

The Privy Council held the Act *intra vires* and valid. The Act was intended to prevent a person of Japanese race voting. A child of Japanese parentage born in Vancouver City would be a natural-born subject of the King and yet might be excluded from the possession of the franchise. In the past restrictions had been placed upon persons of religious denominations but it had never been suggested that their exclusion from the franchise freed them from allegiance to the Sovereign. “The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.” The Act was therefore within section 92, sub-section 1, and valid.

Section 41 of the British North America Act, 1867, gives the Parliament of Canada power to legislate over all matters relative to the qualifications and disqualifications of persons to be elected or to sit and vote as members of the House of Assembly or Legislative Assembly in the several Provinces, but the British Columbia Provincial Elections Act, 1897, was not impeached on the ground of its being in conflict with this section

because "although in 1885 the Dominion Parliament passed a Franchise Act it was repealed in 1898, and in 1903 the Dominion Government had passed no new Act providing for uniformity of franchise. In 1920 the Dominion passed the Federal Franchise Act, which, however, accepted any existing disqualifications under Provincial laws as also disqualifying for the Federal franchise. In England naturalization under section 3, sub-section 1 of the British Nationality and Status of Aliens Act, 1914, entitles a naturalized subject to all political and other rights enjoyed by a British-born subject, but section 26 provides that nothing in the Act is to take away any power of a Government of a British Possession "from treating differently different classes of British subjects." There is, therefore, nothing to prevent the Legislatures of Crown Colonies, where the Act directly applies, or Dominion or Provincial Governments where the Act has been adopted, from disfranchising classes of naturalized or British-born subjects on account of colour or race.

But apart from disqualifying Japanese from voting, the Provincial Legislatures, particularly the Province of British Columbia, have sought to prevent the employment of Japanese and Chinese upon land and in mines owned by the Government. In *Brooks-Bidlake and Whittall, Ltd. v. Att.-Gen. for British Columbia*, [1923] A. C. 451, the Government of British Columbia had granted licences to the appellants to cut timber upon land owned by the Province. The licences were for a year and were renewable from year to year. It was a term of the licence that no Chinese or Japanese were to be employed on such work. Brooks-Bidlake and Whittall, Ltd., accepted the licences with such conditions attached to them and subsequently disregarded the conditions and employed both Chinese and Japanese. The Government then cancelled the licence, but the Court of Appeal of British Columbia declared the condition invalid and outside the powers of the Provincial Government to make in a Government contract. Thereupon the Provincial Legislature passed a special Act, the Oriental Orders in Council Validation Act, 1921, declaring that the proviso had the force of law and that a violation of it should be a sufficient ground for cancelling the licence. Brooks-Bidlake and Whittall, Ltd., then sought a

declaration that the Act was invalid and beyond the powers of the Provincial Legislature, and an injunction restraining the Provincial Government from interfering with their enjoyment of the timber licences on account of their employment of Chinese and Japanese.

The Privy Council were asked to declare the Act *ultra vires* on the ground that it conflicted with the Japanese Treaty Act, passed in 1911, by the Imperial Government and extended to Canada by an Act passed in 1913 by the Dominion Parliament. The treaty provided that the subjects of Great Britain and Japan were to be placed in all respects on the same footing as the subjects of the most-favoured nation "in all that related to the pursuit of their industries, callings, professions, and educational studies."

The Privy Council distinguished this case from *Union Colliery v. Bryden* (see p. 183) on the grounds that the prohibition did not prevent aliens from residing and earning their living in the Province, and only referred to Crown lands, and furthermore the Dominion powers as to naturalization and aliens must be read subject to the provincial rights to manage its public lands as it thinks fit, which power is conferred on the Provincial Legislatures by section 109 of the British North America Act. It held that the Act was not in conflict with Dominion powers under section 91, sub-section 25 (naturalization and aliens), but came under section 92, sub-section 5, which gives the Provincial Legislatures power over the sale of public lands belonging to the Province and of the timber and wood thereon. On the point whether the Act conflicted with the Imperial Treaty the Privy Council seemed to be diffident about expressing an opinion. It held that as the licences provided that they should be forfeited if either Japanese or Chinese were employed, and the licences were forfeited for at least one reason, namely, that Chinese had been employed, and there was no need to consider whether they had been forfeited for any other.

The validity of the Oriental Orders in Council Validation Act, 1921, passed by the Provincial Legislature of British Columbia was, however, settled a year later. In *Att.-Gen. of British Columbia v. Att.-Gen. of Canada*, [1924] A. C. 203, the

facts were similar to those in the *Brooks-Bidlake Case*. The Executive Government had since 1902 made an order that all tunnel and drain licences issued under the British Columbia Mineral Act should contain a proviso that no Chinese or Japanese should be employed in or about tunnels, drains or premises to which the licences or leases related. The provisions of 1902 had been declared to have the force of law by the Oriental Orders in Council Validation Act, 1921. The Privy Council was asked to consider whether the Validation Act of 1921 was valid in part or in whole. The licences here considered referred to work of certain kinds in general and not as in the *Brooks-Bidlake Case* to work on Provincial Crown lands. Accordingly, the Privy Council distinguished the case from the *Brooks-Bidlake Case* and held the Validation Act invalid as conflicting with the Anglo-Japanese Treaty, and section 132 of the British North American Act, 1867 : "The Parliament and Government of Canada shall have all powers necessary or proper for the performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries." As far as Japanese subjects were concerned the Act was therefore invalid, but the Privy Council declined to express an opinion on its legality had it been restricted to Chinese.

#### Australia: State interference with Federal Instrumentalities.

—In Australia similar cases have come up for decision where the State Legislatures have sought to tax or otherwise interfere with the instrumentalities of the Commonwealth. The Commonwealth Constitution being more truly federal in its character than the Canadian, it is not surprising that the Australian Courts applied, in the earlier instances, the doctrine of the immunity of State and Federal instrumentalities as enunciated in the decisions of the American Supreme Court.

In the *Municipal Council of Sydney v. Commonwealth*, [1904] 1 C. L. R. 208, the Municipal Rating Committee of Sydney sought to levy a municipal rate upon the General Post Office, Post Offices, Department of Naval and Military Training and Custom House within the city. These had formerly belonged to the State but had become Commonwealth property as a result

of the then recent federation. It was held that so much of the State law as purported to impose rates on Commonwealth property was invalid. Here the Court, in the first notable instance in Australia, applied the doctrine of the immunity of instrumentalities. In so far as it is part of the prerogative of the Crown that the Crown shall be exempt from any taxing statute in the absence of express words, the Court might also have based its decision on the prerogative.

*D'Emden v. F. Pedder* (1904), 1 C. L. R. 91, was the first of the cases affecting the liability of Federal employees to pay taxes or duty in respect of their salaries for their Federal appointments. D'Emden held a Federal appointment as Deputy Postmaster-General in the State of Tasmania. On June 3, 1903, D'Emden was summoned to Hobart on an information of Pedder, a superintendent of police in the service of the State of Tasmania, that he had given a receipt for a sum of £41 9s. 8d. paid him as salary for his federal appointment without seeing that the receipt was duly stamped in accordance with the Tasmanian stamp duties. He was fined a shilling and costs, or in default seven days. D'Emden appealed on a Case stated by the Hobart magistrates to the Supreme Court of Tasmania, which affirmed the conviction.

The High Court of Australia for the first time applied the doctrine of the immunity of federal instrumentalities as laid down by Marshall, C.J., in *M'Culloch v. The State of Maryland* (1819), 4 Wheaton 316, and quashed the conviction on the ground that the attachment by any State law of any condition to the discharge of a Federal duty was an interference with Federal instrumentalities.

In *Deakin v. Webb; Lyne v. Webb* (1904), 1 C. L. R. 585, the facts were again very similar. Alfred Deakin had been assessed on £233 for 1901 as a member of the Commonwealth of Australia House of Representatives, and on £1,650 in respect of his salary as a Minister of State. The money so received had been paid into the Melbourne Branch of the Union Bank of Australia, and Thomas Prout Webb, Commissioner of Taxes for the State of Victoria, claimed to assess it to Victorian income tax under the Victoria Income Tax Act, 1895. Sir Alfred Lyne's

case was similar save that he was domiciled in New South Wales. The High Court, following the reasoning in *D'Emden v. Pedder*, which had then recently been decided, and applying the doctrine of the immunity of instrumentalities as laid down by Marshall, C.J., in *McCulloch v. Maryland* (see p. 164) held that the Ministers' salaries were not liable to the Victorian tax, and refused to certify an appeal under section 74 of the Australia Constitution Act, 1900, to allow the case to go to the Privy Council.

In *Webb v. Outrim*, [1907] A. C. 81, the facts were again very similar to those in *Deakin v. Webb* (*cit. supra*) but the decision of the Privy Council was the reverse. Outrim was Deputy Postmaster-General in Victoria, an appointment under the Commonwealth Government. He was resident in Victoria and assessed to Victorian income tax under the Victorian Income Tax Act, 1895, No. 1374, and the Victorian Income Tax Law of 1904, No. 1938, on £900, his salary for the appointment. The Supreme Court of Victoria held itself bound by the High Court's decision in favour of the Federal doctrine of immunity of instrumentalities as laid down in the case of *Deakin v. Webb* (*cit. supra*) then recently decided, and made an order against the assessment, but Hodges, J., granted Webb, the Commissioner of Taxation, leave to appeal direct to the Privy Council, notwithstanding section 77, sub-sections 2 and 3 of the Commonwealth of Australia Act, 1900 (see p. 89). He held the Commonwealth Judiciary Act, No. 6 of 1903, so far as it attempted to transfer any matter previously within the jurisdiction of a State Court to the category of Federal jurisdiction, invalid and *ultra vires* the Commonwealth Government. Accordingly, the Commissioner of Taxation brought his appeal direct to the Privy Council and the Attorney-General for the Commonwealth petitioned the Privy Council to dismiss the appeal.

The Privy Council (*per* the Earl of Halsbury), applying the principles of its decision in *Bank of Toronto v. Lambe*, decided in favour of the State's claim for income tax, and rejected the American doctrine of the immunity of instrumentalities as irrelevant.

On the question of the right of direct appeal to the Privy

Council from the Supreme Court of a State it dismissed the Commonwealth's petition, and held that the Commonwealth had no power to take away the right of appeal to the King in Council then existing. The Commonwealth of Australia Act, 1900, s. 106, provides : "The Constitution of each State of the Commonwealth shall, subject to the Constitution, continue as at the establishment of the Commonwealth . . . until altered in accordance with the constitution of the State"; and section 107 : "Every power of the Parliament of a colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be." The Privy Council interpreted these sections as meaning that unless the States under the Federal Constitution Act have granted themselves the powers in question of all their pre-existing powers remain unimpaired. They took the view that if the State legislative power was abused in such a way as seriously to impede the activity of Federal instrumentalities, the inconvenience could always be checked by the exercise of the Crown veto over colonial legislation.

In *Baxter v. Commissioners of Taxation of New South Wales* (1907), 4 C. L. R., vol. ii, 1087, the facts again were very similar, but the Australian High Court adhered to its decision in *Deakin v. Webb* and refused to recognise the decision of the Privy Council in *Webb v. Outrim*. The facts were that a receiver of taxes in New South Wales sought to recover from a Federal Government official income tax under the Land and Income Tax Act of New South Wales. The Judge of the District Court followed the Privy Council decision in *Webb v. Outrim* and decided in favour of the assessment. The official appealed to the High Court. Griffith, C.J., held that the High Court was the ultimate arbiter. He refused to recognise the Privy Council's decision in *Webb v. Outrim* and followed the considered decision of the High Court in *D'Emden v. Pedder*, 1 C. L. R. 91. He had already there said : "We cannot disregard the fact that the Constitution of the Commonwealth was

framed by a convention of the representatives from the several colonies. We think that sitting here, we are entitled to assume —what after all is a fact of public notoriety—that some, if not all, of the framers of that Constitution were familiar, not only with the Constitution of the United States but with that of the Canadian Dominion and those of the British Colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from the provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of the Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.” In construing the Constitution regard, he considered, must be had to the fact that it is an instrument of government calling into existence a new State with sovereign powers subject only to the British Crown. The duty of the High Court in regard to questions under section 74 is to be determined upon consideration of a whole purview and history of the Constitution.

The view of the High Court that it was the supreme arbiter in all constitutional questions therefore prevailed, and in the same year the Commonwealth Parliament passed the Judicature Act, No. 8, 1907, which makes back-door appeals from the Supreme Courts of the States direct to the Privy Council impossible (see p. 89.)

**Australia: Federal Interference with State Instrumentalities.** —The application of the doctrine of immunity of instrumentalities in the earlier cases affecting the interpretation of the Constitution in Australia has not been applied so rigidly in the case of Federal interference as in the case of State interference. In *The King and Minister of State for the Commonwealth administering the Customs v. Sutton* (1908), 5 C. L. R. 789, a quantity of wire netting had been purchased in England and imported into the Commonwealth by the Government of New South Wales for re-sale to farmers in New South Wales and was landed at the port of Sydney without entry having been made or passed and without authority of the Federal customs officers. The defendant, Edwin Frederick Sutton, acting under the authority of the

Executive Government of the State, removed the goods from the place where they were stored without paying the Commonwealth customs duty. The Australian High Court held that the defendant had committed a breach of sections 33 and 236 of the Customs Act. Higgins, J., in his judgment said : "If the defendant is right, the State Government can loftily ignore a prohibition or regulation of the importation of opium, of kanakas, or goods or persons from an infected port : and the powers of the Commonwealth Parliament designed for the good of the people of Australia will be rendered futile and illusory."

In *Att.-Gen. New South Wales v. Collector of Customs New South Wales* (1908), 5 C. L. R. 818, the facts were very similar save that the subject-matter was steel rails imported by the Government of New South Wales for the use of its State railways. In favour of the immunity of the goods from Federal duty as State instrumentalities, arguments were put forward based upon the American doctrine of the immunity of instrumentalities and the prerogative of the Crown to be free from taxation.

The Australian High Court held that the rule laid down in *D'Emden v. Pedder* and applied in *Federated Amalgamated Government Railway Association and Tramway Service v. New South Wales Railway Traffic Employees' Association*, 4 C. L. R. 488 (see p. 198), had no application to powers which are conferred upon the Commonwealth in express terms and which by their nature manifestly involve control of some operation of the State Governments such as the power to make laws with respect to trade and commerce with other countries and with respect to taxation. It must be assumed that the Legislature intended that, so far as is necessary for the effective exercise of these powers, the rights of State Governments should be restricted. The imposition of customs duties being a mode of regulating trade and commerce with other countries as well as an exercise of the taxing power, the right of State Governments to import goods is subject to the customs laws of the Commonwealth. Further the rule has reference to the performance of the functions of government within the Commonwealth and therefore cannot be applied to the importation by a State Government of goods to be afterwards used in connection with one of its

instrumentalities. The High Court held, therefore, that, following its decision in *The King v. Sutton* (*cit. supra*), the Government of the State of New South Wales was liable to pay customs duty on the steel rails imported by the State for use in connection with the Government railways of the State.

It must be noticed that these two decisions, *The King v. Sutton* and *Att.-Gen. New South Wales v. Collector of Customs N. S. W.*, are in accordance with recent American and Canadian decisions (see *Att.-Gen. British Columbia v. Att.-Gen. Ontario*, p. 169). The American Courts have frequently distinguished between property held as an instrumentality for carrying on the administration of State or Federal government and property held temporarily by the Federal or State Government while it is making an incursion into trading which is not an essential part of its administration as contemplated by the Constitution (c).

On the subject of the prerogative of the Crown being exempt from taxation, the Australian High Court at one time put forward a new doctrine that there might be some Governments in the Empire with superior prerogatives and others with inferior prerogatives. Isaacs, J., said : "The Federal Government has an exclusive and dominant prerogative," but in advancing this curious doctrine the High Court completely overlooked section 114 of the Commonwealth of Australia Act, 1900 : "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State." The High Court in the above-mentioned two cases based their decision partly on the new doctrine of superiority of prerogatives in the Federal Government, saying that "in the consideration of a Commonwealth Statute dealing with matters in which the whole control is given to the Commonwealth as is the case with customs (sections 86 and 90), the rule that the Crown is not bound by statute applies only to the Sovereign as head of the Commonwealth Government, and not as head of the States."

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(c) See Keith, Vol. II, pp. 881-6.

This doctrine of superiority of prerogatives has, however, since been abandoned.

**Other Instances of Conflict between Federal and State Powers: Australia.**—Apart from the question of direct taxation of Federal instrumentalities in the cases already mentioned, conflict between Federal and State powers has occurred chiefly in regard to labour legislation and control of industrial combinations. The only important "liquor legislation" case has been *Peterswald v. Bartley*, (1904) 1 C. L. R. 497. There the respondent, E. C. Bartley, had been charged under section 75 of the New South Wales Liquor Act of 1898 by Sergeant Peterswald, a district licensing inspector, "that on the 25th Dec. 1903 at Cootamundra in the licensing District of Cootamundra he did carry on the trade or business of a brewer without holding a proper licence under the Liquor Act, 1898 (No. 18)." The Act in question had been passed by the New South Wales legislature, before the Federation of Australia, and Bartley, while admitting he had no licence, contended that it conflicted with the powers given to the Commonwealth Government "to impose duties of customs and excise" under section 90 of the Commonwealth Act. He had a licence under the Commonwealth Beer Excise Act, No. 7 of 1901, which entitled him to carry on trade and business as a brewer in any part of the Commonwealth, and it was contended that the State Liquor Act of 1898 was a duty on excise within the meaning of section 90 and *ultra vires* the State Legislature. The High Court held that the imposition of such licence fees was a *bona fide* exercise of the police power of State for control and regulation of trade, and was *intra vires* and that accordingly Bartley must stand convicted.

There have, however, been one or two cases of an analogous type arising out of the policy of the Australian Government to force employers to pay higher wages by taxing goods of employers paying lower wages, or allowing employers who paid higher wages to use workers' registered trade marks. Thus in *R. v. Barger*, 6 C. L. R. 41, the High Court was asked to consider the validity of a Federal Excise Tariff Act which levied a duty corresponding to a customs duty on harvester machinery manufactured in Australia by manufacturers who did not pay

certain rates of wages. Section 55 of the Commonwealth Act provides that "laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only." Although section 90 gives the Federal Parliament power to impose excise duties, the High Court considered this was neither a protectionist nor a revenue Act but a measure to compel employers to pay a living standard of wages analogous to a factory Act and outside the powers of the Commonwealth Parliament. The High Court therefore held the Act *ultra vires* and invalid.

Similarly, in *Att.-Gen. New South Wales v. Brewery Employees' Union v. New South Wales*, 6 C. L. R. 469, the High Court was asked to consider the validity of the Commonwealth Trade Marks Act, 1905. The Act provided for the registration of workers' trade marks and refused the use of marks where trade union conditions were not in force. Its object was to penalise sweated labour by bringing to the notice of the public the fact that certain brands of low-priced goods were, by the absence of a trade mark on them, produced by sweated labour.

The argument in favour of the validity of the Act was that it was within the powers of the Commonwealth Parliament under section 51 (xviii)—"Copyrights, patents of inventions and designs and trade marks." The High Court considered it a piece of industrial legislation in disguise and held it *ultra vires* on the ground that a worker's trade mark of this character was not really a trade mark at all as denoting that the goods were made by a particular firm but denoted the class of worker that made them, while the essence of a trade mark was that it distinguished the ownership of the goods.

The most fruitful source of conflict of Federal and State laws in Australia has been in the field of industrial arbitration.

At an early date the Commonwealth Labour Government adopted the policy of forcing parties to an industrial dispute to subject their differences to a specially constituted industrial Court which enforces its arbitration in the form of industrial judgments. Such procedure necessarily involves an interference with civic rights and property which are normally

subjects within the control of the State Legislatures. There have consequently been a series of test cases to try the validity of such Federal legislation. In the first of these, *Clough v. Leahy* (1904), 2 C. L. R. 139, a Royal Commission had been created by Letters Patent in 1904 under the presidency of Alfred Paxton Backhouse, a Judge of the High Court, to inquire "whether the Machine Shearers, &c. Union, Industrial Union, &c. was an ~~ob~~stacle to the fair and complete presentation of any dispute which might arise in the pastoral industry to the Industrial Arbitration Court." Leahy, secretary of the Machinie Shearers' Union, refused to be sworn and refused to answer questions relating to his union. He thereby made himself liable to certain penalties from which he appealed on the grounds that the Commission was invalid because at that time his union was involved in litigation in which its character was in dispute, and the questions sought to be put by the Commission were an interference with private rights and the administration of justice. The High Court held that the Commission was legally constituted and its inquiry lawful. The Courts had no power to restrain persons acting under the authority of such commission provided they did not invade private rights or interfere with the course of justice.

In *Huddard, Parker & Co. (Proprietary), Ltd. v. Moorehead* (1908), 8 C. L. R. 330, the facts were somewhat similar. Under the Australian Industries Preservation Acts, 1906-7, a Commission had been set up to inquire into conditions of manufacture of foreign goods and call before it and examine witnesses. Huddard, Parker & Co., a company formed in the State of Victoria, was called before it and asked questions relating to the coal trade, which it refused to answer. The firm was then charged on the information of Moorehead, an officer of the Commonwealth Customs. The company alleged that section 5 (i) and section 8 (i) of the Industries Preservation Act, 1906, were unconstitutional and *ultra vires*, and the Commission had no power to inflict penalties because its procedure was not in conformity with trial by jury provided by section 80. The High Court held the Act *intra vires*. Although the Commonwealth has no power to create corporations, it has power over foreign

corporations and trading and financial corporations created by statute.

In 1912 occurred the case of *Att.-Gen. Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.*, 17 C. L. R. 644; [1914] A. C. 287. The Colonial Sugar Refining Co. was a company registered in 1887 under the then Companies Act of New South Wales. It carried on a business in various parts of Australia, New Zealand and Fiji Islands in manufacturing, buying and selling sugar. Under the provisions of the Royal Commissions Acts, 1902-12, the Commonwealth Government had set up a Commission to inquire into trusts and monopolies with power to bring witnesses before it. The President of the Commission could by writing call upon a company to answer questions relating to its profits and produce documents and books, and there was a penalty of £50 provided for any person who refused to attend and furnish information. The Commission was appointed to "inquire into and report upon the sugar industry in Australia and more particularly in relation to (a) growers of sugar cane and beet, (b) manufacture of raw and refined sugar; (c) workers employed in the sugar industry; (d) purchasers and consumers of sugar; and (e) costs, profits, wages and prices." Certain questions were forwarded by the President to the company's solicitors, and notice was given to produce certain documents, which they refused to do, and were fined £25 and £320 costs. The company applied for a declaration that the Royal Commissions Acts, 1902-12, were invalid and an injunction restraining the members of the Commission proceeding further on summonses then pending. The High Court, by the casting vote of the Chief Justice, following their own decision in *Huddard, Parker & Co. v. Moorehead* were of the opinion that the Acts were *intra vires*. Section 74 of the Commonwealth Act provides that there shall be no appeal upon any question, however arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, without leave of the High Court, but the High Court in this case took the exceptional course of so certifying, and thus the case came to the Privy Council (d).

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(d) In *Jones v. Att.-Gen. Australia*, [1917] A. C. 528, the High Court

The legislation in question, setting up these statutory commissions, purported to be made under section 51, sub-section 1—"trade and commerce with other countries, and among the States." The Privy Council held that the measures were in conflict with section 107, which provides that "every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be." The power to impose new duties on the subjects of, or on people residing in, any individual State was, before the Federation, vested in the Legislature of that State, and the Acts in which they were passed by the Commonwealth Parliament could not be brought within the powers which by clause 51 of the Constitution, are exclusively vested in the Commonwealth Parliament. In contradistinction to the British North America Act, 1867, "The principle of the Constitution of the Commonwealth, embodied in the Act of 1900, is federal in the strict sense of that term, namely, in that the federating States, whilst agreeing to a delegation of a part of their power to a common government, preserved in other respects their individual Constitutions unaltered."

Similar difficulties have arisen when an order has been made to subject an industrial dispute to the Industrial Arbitration Court, and it could be clearly shown that one of the parties to the dispute was a State Government in its capacity as an employer paying many thousands of workpeople engaged on its railways and factories. Thus in *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Traffic Employees' Association* (1906), 4 C. L. R. 488, a trade union, which included among its members railwaymen and others employed in the service of the Government of New South Wales, applied to the Registrar of the Commonwealth Court of Conciliation and Arbitration to be registered as an

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refused to certify an appeal from an industrial decision, and the Privy Council held that His Majesty in Council was precluded by section 74 from hearing an appeal.

organisation under the Commonwealth and Arbitration Act, 1904. The application was opposed by the Federated Amalgamated Government Railway and Tramway Association on the grounds that the N. S. W. Traffic Association contained State railway servants and was *ultra vires* and void. The President stated a Case and an appeal was taken to the High Court. The High Court held the Association could not be registered and the application of the Act to cover workers on State railways was *ultra vires* as an interference with a State instrumentality. The High Court considered this a case of a Federal interference with a State instrumentality, to which the rule laid down in *D'Emden v. Pedder*, 1 C. L. R., at p. 111, applied : "When a State attempts to give to its legislature or executive authority an operation which if valid would fetter control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt is reciprocal. It is equally true of attempted interference by the Commonwealth with State instrumentalities. The application of the rule is not limited to taxation. A State railway is a State instrumentality within that rule." The High Court therefore held the Commonwealth Conciliation and Arbitration Act, 1904, was *ultra vires* and void and the association was not entitled to be registered.

In 1910 the Constitutional Amendment Act was passed which altered section 51 (xxxv) to read : "Labour and employment including (a) the wages and conditions of labour and employment in any trade, industry, or calling, and (b) the prevention and settlement of industrial disputes including disputes in relation to employment on or about railways the property of any State."

The case of *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Traffic Employees' Association* has no longer any direct bearing on the interpretation of the Constitution but is frequently put in the same class of cases affecting State and Federal instrumentalities as *D'Emden v. Pedder*, *Deakin v. Webb*, *Webb v. Outram*, *R. v. Sutton*, and *Att.-Gen. New South Wales v. Collector of Customs, New South Wales*. It is one of the instances where the doctrine of immunity was applied. The year following, in

1907, the Privy Council gave a reverse decision and rejected the doctrine in *Webb v. Outrim*. The High Court of Australia later again applied the doctrine as we have seen (see p. 190) in *Baxter v. Commissioners of Taxation of New South Wales* (1907), 4 C. L. R. ii, 1087, which followed soon after *Webb v. Outrim*.

In the *Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd. and Others* (1920), 28 C. L. R. 129, the High Court altered their interpretation of section 51 and overruled their decision in *Federated Amalgamated Govt. Ry. and Tramway Service Association v. N. S. W. Traffic Employees' Association*, so that the Privy Council decisions in *Webb v. Outrim* and *Att.-Gen. Commonwealth of Australia v. Colonial Sugar Refining Co.* now prevail and the American doctrine of immunities may at all events be looked upon as a theory of the past. *Deakin v. Webb*, 1 C. L. R. 585, and *Baxter v. Commissioners of Taxation, N. S. W.*, 4 C. L. R. 1087, are, at any rate, definitely overruled.

The facts briefly stated in the *Amalgamated Society of Engineers v. Adelaide S.S. Co.* were that a strike had occurred in the engineering trade which had affected engineering works in all parts of Australia. The engineers' union, the Amalgamated Society of Engineers, applied to have the industrial dispute subjected to arbitration under the Commonwealth Conciliation and Arbitration Act. The Adelaide Steamship Co., with some 845 other employing firms, was involved and were made respondents for the rest. The Amalgamated Society of Engineers included among its members engineers employed by the Minister of Trading Concerns, State Implement and Engineering Works and State Services, of Western Australia. The Minister opposed the application on the grounds that there could not be an industrial dispute between a trade union and the Government of Western Australia, even though it might be proved that some of the work done in the Government engineering workshops might be for private persons and afterwards paid for by them. The High Court, reversing its own decision in *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Traffic Employees' Association*, held that a dispute did exist and that the Common-

wealth has power under section 51 (xxxv) (as amended) to make laws binding on the States with respect to conciliation and arbitration, and that a dispute between an organisation of employees and a Minister of the Crown for a State acting under the authority of a statute of that State would be an industrial dispute within section 51 (xxxv). The Commonwealth of Australia Act being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia, was, by its own inherent force, binding on the Crown to the extent of its operation.

The tendency of recent decisions in Australia has therefore been to limit the application of the doctrine of immunity of instrumentalities. In the case of a Federal interference with State instrumentalities one may say that the doctrine has been totally rejected, for the Courts now give a more extensive interpretation of section 109 : "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, as to the extent of the inconsistency, be invalid." On the other hand, protection of Federal instrumentalities is no longer upheld by application of the doctrine as enunciated in the American decisions, but by application of a more extensive interpretation of sections 86, 90 and 102.

**Conflict between Union and Provincial Powers: Union of South Africa.**—The Constitution of South Africa under the South Africa Act, 1909 (7 Edw. 7, c. 9), is in no sense federal in its character. The Constitution represents a Legislative Union under one Government of what were four independent colonies, which as such disappeared and were completely merged in the Union (see section 4 of the South Africa Act, 1909). In place of these four independent colonies there are now four Provincial Governments, but their powers are strictly limited by section 85 of the South Africa Act under thirteen headings. They derive their powers solely from the Act. The position was not as in the Federation of Australia, where six colonies agreed to vest certain powers in a Federal Legislature and retained the surplus. The powers of the Provincial Legislatures of the South African Union are definitely limited by the Act; in this respect they are

analogous to the Provinces of Canada save that their powers are less extensive. But whereas the Provinces of Canada have powers which cannot be overridden by the Dominion Parliament, provided they are validly exercised, section 86 of the South Africa Act provides that : " Any Ordinance made by a provincial council shall have effect in and for the province as long as and as far only as it is not repugnant to any Act of Parliament." In other words, if a Provincial Legislature passes an Ordinance within the ambit of its powers coming under the thirteen headings of section 85, and the Union Parliament passes an Act which conflicts with the Provincial Ordinance, the Union Act prevails. Under section 64 the Union Legislature may even abolish the Provincial Legislatures, whereas the Provinces of Canada have power to amend their Constitutions, and may thus alter the Canadian Constitution. The only limitation upon the power of the Union Government to abolish the Provincial Councils is that any such Bill amending or repealing the Constitution of a Provincial Council must be reserved by the Governor-General for the King's pleasure. Whereas a Canadian Province is governed in the name of the King, the head of a South African Provincial Government is styled " the Administrator," and is a public official of the Union Government (see p. 122). Section 84 provides : " In regard to all matters in respect of which no powers are reserved or delegated to the provincial council, the administrator shall act on behalf of the Governor-General in Council when required to do so, and in such matters the administrator may act without reference to other members of the executive committee." Section 90 provides that any proposed Ordinance of a Provincial Council shall be presented by the Administrator to the Governor-General in Council for his assent, and the Governor-General in Council must declare within a month whether he assents, withholds assent, or reserves his assent. If a proposed Ordinance is reserved it has no force unless and until the Governor-General in Council within a year makes known by proclamation that it has received his assent. There is, therefore, no distribution of powers and no conflict of powers in the sense in which these terms are used in the administration of a federal system of government.

Whereas the Provinces of Canada and the States of Australia have each their own Courts and judiciary, and can make laws governing the administration of justice within their areas and the composition of their Courts, there are no Provincial Courts in South Africa, but the Supreme Court of the Union is divided into four divisions corresponding to the four Provinces. By section 106 appeal to the Privy Council from the South Africa Appeal Court is not allowed as of right under any circumstances, whereas in the Australia Constitution Act, 1900, s. 74, appeal as of right is limited only in respect of cases affecting the Constitution. Section 106 of the South Africa Act, 1909, provides that His Majesty in Council may give special leave to appeal but the Union Parliament may make laws limiting the matters in respect of which such special leave may be asked, and in practice leave is never granted. (For machinery necessary to make amendment in the Constitution, see pp. 144-5.)

**The Composition of the Provincial Councils.**—Section 70, subsection 1, provides that every Province shall have a council consisting of the same number of members as it has members in the House of Assembly, but not less than twenty-five. Section 73 provides that the Councils are to be elected for three years and shall not be subject to dissolution save by effluxion of time. The Provincial Councils are presided over by chairmen elected by the Councils themselves. The administration of the Province is in the hands of the Administrator aided by an executive committee of four members elected by the Provincial Council either from its own members or outside its membership. The Executive Council is in no sense a responsible Ministry. It cannot force an election of a new Provincial Council if it cannot carry its measures, nor can it be made to resign if it has lost the confidence of the Council. The Administrator is present and takes part in the deliberations of the Provincial Council, but has not the right to vote. Members of the Executive Committee who are also members of the Provincial Council vote, but not members of the Executive Committee who are not members of the Council, though they may take part in the deliberations of the Provincial Council.

In respect of matters within the powers of the Provincial

Council, the Administrator is expected to take the advice of his Executive Committee, but section 84 provides that in regard to all matters in respect of which no powers are reserved or delegated to the Provincial Council, the Administrator is free to act on behalf of the Governor-General in Council when required to do so, and in such matters the Administrator may act without reference to the other members of the Executive Committee.

Section 78, sub-section 2, provides that members of the Executive Committee of a Province shall receive such remuneration as the Provincial Council with the approval of the Governor-General shall determine. In *Ex p. Van der Merwe: Havenga's Election, 1916*, an election appeal was lodged that a member of an Executive Committee was incapable of holding a seat in the Union Parliament because, under section 53 (d), he was disqualified by reason of holding an office of profit under the Crown. It was held that a member was not incapable of sitting in the Union House of Assembly because the duties of a member of an Executive Council of a Province were precisely the same in character within the sphere of competence of the Executive Committee as those of a Minister of the Union, and therefore came within the exception contained in section 53 (d) (1).

**The Powers of the Provincial Councils.**—As has already been stated the powers of the Provincial Councils are limited in section 85 under thirteen heads. They include powers expressly vested over direct taxation, borrowing for purposes of the Provincial Government, education, agriculture, hospitals and charitable institutions, municipal institutions, local works other than railways and harbours, roads and bridges, other than bridges connecting two Provinces, markets, fish, game, criminal offences against Provincial Ordinances, and "generally all matters which, in the opinion of the Governor-General in Council, are of a merely local or private nature in the province."

It must be noticed that although the Governor-General may declare a subject to be within the scope of the powers of a Provincial Council, any person refusing to comply with an Ordinance may apply to the Supreme Court for a declaration that the Ordinance is *ultra vires* and invalid.

In addition to these subjects, power is given under section 85 (xiii) for the Union Parliament to delegate to the Provincial Councils by any law power to make Ordinances. Under several Acts the Union Parliament has delegated powers to the Provincial Councils, particularly in regard to the taxation of natives. But whether Ordinances are made under colour of the powers expressly given the Provincial Councils in section 85 or under delegated authority of the Union Parliament, Ordinances are always liable to be vetoed by the Governor-General in Council or disallowed as conflicting with existing Acts of the Union Parliament.

If Ordinances are, however, not impeachable on these grounds, they cannot be impeached on the grounds that they are unreasonable in the same way as the validity of a by-law of an English municipality or railway company can be held invalid as an inordinate interference with private rights and property.

Thus in *Middelburg Municipality v. Gertzen*, [1914] A. D. 544, the Provincial Council of the Cape of Good Hope had passed an Ordinance (No. 10 of 1912), section 155, sub-section 6, whereby the general municipal laws of the Province were codified and liability for rates levied on property was cast upon a mortgagee of such property in all cases where the mortgagee received the rent of the property. No such provision had existed in the law of Cape Colony before the South Africa Act, 1909, but somewhat similar legislation had been passed in some of the other colonies prior to the Union. Gertzen, a mortgagee of property was sued by the municipality of Middleburg for £1 12s. 7½d. rates due on the property of one C. Kruger, who was the owner. *Inter alia*, he pleaded that the section was *ultra vires*. The magistrate gave judgment for the municipality. The Provincial Division held section 155 *ultra vires* and allowed his appeal. The Supreme Court held that the state of the law prior to the date of the delegation of legislative authority, though not an exclusive or decisive test, is an element to be taken into account in determining what legislative powers should be implied as being reasonably required in order to deal effectively with the assigned subject-matter. When once it is clear that the legislative provisions which are challenged fall under

the powers conferred upon Provincial Councils the Court cannot interfere with them on the grounds that they are unwise, impolitic or unreasonable. The Ordinance came within section 85, head (vi), "Municipal institutions, divisional councils and other local institutions of a similar nature," and was valid. The principles applicable to settling the validity of the by-laws of a municipality as laid down in *Kruse v. Johnson*, [1898] 2 Q. B. 91, and *Att.-Gen. v. London County Council*, [1901] 1 Ch. 781, did not apply. The various Canadian decisions, including *Hodge v. The Queen* (1883), 9 A. C. 117 (see p. 175), were examined, but rejected as irrelevant. The Chief Justice described the status of the Provincial Councils thus: "There are important differences between the Canadian Constitution and our own, and our Provincial Councils stand in a position of subordination to the Union Parliament for which the British North America Act can afford no parallel. Here both bodies derive their powers from the same enactment, and it is an original authority not delegated by the Union Legislature. . . . A Provincial Council is a deliberative legislative body and its ordinances must be classed under the category of statutes not by-laws. They have the full force of law within the province. No question of legislative competition can arise: the power of Parliament is never in doubt. The only question is whether the subordinate legislature has exceeded the powers assigned to it."

As has already been pointed out there can be no serious overlapping of jurisdiction between the powers of the Provincial Councils and the Union Parliament, because, if a Provincial Ordinance is in conflict with an Act of the Union Parliament, the Provincial Ordinance must give way. On the other hand, if a Provincial Council exceeds its powers, the matter can be put right by an Act of the Union Parliament, if there is a popular demand in its favour. The only serious divergency has been the interpretation of what constitutes direct taxation within the meaning of section 85, head (i), which the Provincial Councils can impose as distinguished from indirect taxation, which is outside their powers. Thus in *De Waal v. North Bay Canning Co.*, [1921] A. D. 521, the Cape Province had passed Ordinance No. 18 of 1920, which placed upon companies carrying on

in the Province the business of canning crayfish, a tax of 3 per cent. on the gross amount received by the company from the sale of tinned or canned crayfish during the twelve months preceding July 1 in any year, subject to a deduction of 20 per cent. "to cover freight, insurance, exchange, brokers' commission, and minor sundry charges." The North Bay Canning Co. sued the Administrator, De Waal, to recover £2545 10s., the amount it had paid during the year, contending that the Ordinance in question was *ultra vires*. The North Bay Canning Co. was a corporation doing almost exclusively an export business, and it in fact passed the tax on to the consumer by charging a higher price for its products. It was held that the tax was an indirect tax on exported goods and *ultra vires*. On the other hand, in *Clarke v. De Waal*, [1922] A. D. 264, a licence duty charged by the Cape Ordinance No. 16 of 1920, calculated upon the "turnover of the business during a period of twelve months ending June 30th in the calender year preceding payment, the rate of duty being £1 on every £1000 of turnover exceeding £1000 to £5000 and £2 on every £1000 of turnover exceeding £5000 with a maximum of £300," was held to be *intra vires*, and within section 85, head (i). Here the Administrator, De Waal, sued Clarke, who was a general dealer, for £224, the amount of additional licensing duty due under the Ordinance. The defendant paid the tax under protest and appealed on the grounds that the tax was only a direct tax upon the first £10 of the £226, and instead of being a licensing tax it was substantially a tax on his product, which he passed on to the consumer in higher prices. The Court examined the Canadian decisions and the definition of John Stuart Mill of a direct tax adopted by the Privy Council in *Bank of Toronto v. Lambe* (1887) 12 A. C. 575 (see p. 165), and held the tax was *intra vires*, for although the intention of the Ordinance was not to tax the dealer personally, it was intended to tax him in proportion to his business and was none the less a direct tax notwithstanding the unusual method of assessment.

## CHAPTER IX.

## THE IRISH FREE STATE: HISTORY OF THE CONSTITUTION—THE CONSTITUTION OF THE IRISH FREE STATE (SAORSTAT EIREANN)—OTHER FEATURES OF THE CONSTITUTION OF THE IRISH FREE STATE: THE DAIL COURTS (a).

As a result of the rebellion which broke out in Ireland in 1916 the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), was passed, which provided for the establishment of two Parliaments, one for Southern Ireland and one for Northern Ireland. Section 1, sub-section 1, provided that Northern Ireland was to consist of the six Parliamentary counties, Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and two Parliamentary boroughs, Belfast and Londonderry. Southern Ireland was to include all the rest of Ireland.

It provided also for a Council of Ireland to be set up, consisting of a President and forty members nominated by the respective Parliaments of Northern and Southern Ireland, seven from the Senate of Northern Ireland, and thirteen from the House of Commons of Northern Ireland, seven from the Senate of Southern Ireland and thirteen from the House of Commons of Southern Ireland.

The Act of 1920, section 3, provided for the Parliaments of the two Irelands to be eventually consolidated into one Parliament for the whole of Ireland. Meanwhile the Lord Lieutenant was to be Governor of both Southern and Northern Ireland and was to be advised in matters relating thereto by the respective Ministries of Southern and Northern Ireland who should form Executive Committees of the Privy Council of Ireland. It set up

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(a) See Journal of Comparative Legislation and International Law, Vol. VIII, Pt. II (May, 1926), p. 19, article by the Hon. Mr. Justice Hanna, Judge of the High Court, Irish Free State.

in either case a system of responsible government which differed from colonial responsible government in two ways :—

(a) Both countries, Southern and Northern Ireland, were to continue to be represented in the Imperial Parliament.

(b) Their legislative powers were severely restricted as compared with those of an ordinary self-governing colony. Many subjects were reserved, including :—

(1) Trade with any place out of Ireland.

(2) Imposition of Customs duties.

(3) Control of home defences. .

(4) The criminal law was to a large extent outside their power. The Legislatures had no power to alter the law relating to treason and felony.

(5) As is similarly provided in the Constitution of Malta, the Legislatures of Northern and Southern Ireland could not legislate in regard to naturalization.

(6) Until the Parliaments of Northern and Southern Ireland were united, the postal services remained under the control of the Imperial Parliament, and the Legislatures could not, meantime, alter the Constitution. Appeals from the Irish Courts were in both cases to go to the English House of Lords. In many ways, therefore, both the Legislatures remained subordinate to the Imperial Parliament.

Southern Ireland refused to accept the Government of Ireland Act, 1920, and consequently it never came into operation in Southern Ireland. Meanwhile the rebellion which had smouldered since 1916, broke out with renewed vigour, and continued until a treaty was made between the Imperial Government and the Irish rebels in December, 1921.

The Agreement of 1921 (afterwards embodied in the Irish Free State Agreement Act, 1922 (12 Geo. 5, c. 4)), provided, *inter alia* :—

“ 1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

“ 2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada (b), and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.”

Articles 11 and 12 provided that the Government of Ireland Act, 1920, should continue to apply to Northern Ireland for a period of one month, after which it should cease to have effect and Northern Ireland should be included in the Irish Free State, “unless a resolution is passed by both House of the Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.”

Article 14 provided : “ After the expiration of the said month, if no such address as is mentioned in Article 12 hereof is presented, the Parliament and Government of Northern Ireland shall continue to exercise as respects Northern Ireland the powers conferred on them by the Government of Ireland Act, 1920, but the Parliament and Government of the Irish Free State shall in Northern Ireland have in relation to matters in respect of which the Parliament of Northern Ireland has not power to make laws under that Act (including matters which under the said Act are within the jurisdiction of the Council of Ireland) the same powers as in the rest of Ireland subject to such other provisions as may be agreed in manner hereinafter appearing.”

Northern Ireland presented an address protesting against the incorporation of Northern Ireland within the ambit of the Treaty. Consequently : (a) The Articles of the Agreement of December, 1921, apply only to Southern Ireland; and (b) The Government of Northern Ireland continues to be that provided under the Government of Ireland Act, 1920.

Article 17 provided for the establishment of a Provisional Government in Southern Ireland to be composed of Members of

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(b) The Irish Free State was admitted to separate representation in the League of Nations, September 10, 1923.

Parliament elected for the constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and the powers of the Imperial Government meanwhile were to be transferred to the Provisional Government so formed, but the arrangement was not to continue longer than twelve months from the making of the Treaty, namely, December 6, 1921.

Articles 7, 8 and 9 of the Treaty provided safeguards against the possibility of the Irish Free State Government putting difficulties in the way of Imperial Defence, and Article 10 provided for compensation of Irish civil servants and other public servants who might be discharged or retire as a consequence of the change in the character of the Government.

Article 16 provided for the free exercise of religion and prohibited any preference or disabilities in favour of or against any particular religion.

The next stage was to give the Treaty legal effect. This was done by the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), which :—

(1) Gave the Crown power to make Orders in Council for the transfer of powers from the Imperial Government to the new Irish Government.

(2) Gave the articles the force of law. The agreement of December, 1921, is printed in a schedule to the Irish Free State (Agreement) Act, which came into force in March, 1922.

(3) Provided (section 1, sub-section 4) that in future no writ was to issue for the election of members for other than a constituency in Northern Ireland to serve in the Imperial Parliament.

(4) Provided (section 1, sub-section 2) that a new Parliament was to be elected in Southern Ireland (in place of the members collected together as above described) to be elected on the same franchise and constituencies as members hitherto returned to the Imperial Parliament and to have the same powers as the Parliament provided for in the Articles of Agreement, that is to say, the new Irish Parliament was to be similar to the Parliament of a self-governing Dominion and the Provisional Government was meanwhile to be responsible to it.

The detailed provisions of a Constitution were then drawn up

by the Constituent Assembly in the Provisional Parliament to include eighty-three Articles embodied as Schedule 1, linked with the provisions of the Treaty as Schedule 2, in the Irish Free State Constitution Act, 1922 (12 & 13 Geo. 5, c. 1), which was on December 5, 1922, passed by the Imperial Parliament (see p. 218).

The character of the Provisional Government as the successor of the British Government came up for legal definition in the case of *Att.-Gen. v. Great Southern & Western Ry. Co. of Ireland*, [1925] A. C. 754. The facts in the case were that by agreements made in 1917 and 1918 between the President of the Board of Trade and the plaintiff railway company, it was agreed that in consideration of the company taking up the rails and sleepers on their lines and transferring them to the Government for the purpose of constructing certain colliery railways to provide coal during the War, the Government would after the determination of the War pay the cost of replacing the lines and sleepers by new ones. The company duly transferred the railway lines to the Government. Under the Ministry of Transport Act, 1919, and an Order in Council made under that Act, the liabilities of the Board of Trade were transferred to the Ministry of Transport.

By the agreement for a treaty between Great Britain and Ireland, which by the Irish Free State Agreement Act, 1922, had been given the force of law, the Irish Free State had been created and a Provisional Government had been established for twelve months.

By the Provisional Government (Transfer of Functions) Order, 1922, made in pursuance of the Act, after a recital showing that there had been set up among other departments of the Provisional Government a Ministry of Economic Affairs to which was assigned the administration of services in connection with (*inter alia*) transport, including functions hitherto performed by the Minister of Transport and the Board of Trade, the functions in connection with the administration of public services in Southern Ireland hitherto performed by existing Government departments were transferred to the Provisional Government. By the Irish Free State Constitution Act, 1922,

s. 8 (d), as respects departmental property rights and liabilities, the Government of the Irish Free State were to be regarded as the successors of the Provisional Government.

Upon a Petition of Right the company claimed a declaration that notwithstanding the above statutes the liabilities of the British Government under the Agreements were still subsisting, and they petitioned for payment of the cost of replacement. It was, however, held by the House of Lords, reversing the decision of the Court of Appeal ([1924] 2 K. B. 450), that under the construction of the Irish Free State Agreement Act, 1922, and the Provisional Government (Transfer of Functions) Order, 1922, *cit. sup.*, the liability had been transferred to the Provisional Government and that consequently it was now vested in the Government of the Irish Free State.

The Government of Ireland Act, 1920, by Schedule VIII had made provision for the taking over of the Irish civil servants, and for purposes of assessing the superannuation to be allowed them on retirement a committee was to be set up as provided in the Act. In consequence of the establishment of the Irish Free State no committee in fact was set up, but by section 10 of the Treaty it was agreed that the Irish Free State should pay compensation not less favourable than that contemplated by the Government of Ireland Act, 1920. The Irish Free State gave this provision statutory force by Act 1 of 1922 of its Legislature. In *Wigg and Others v. Att.-Gen. for the Irish Free State*, [1927] A. C. 674, the appellants were Irish civil servants who had retired in consequence of the change of government and being dissatisfied with the superannuation allowances granted them by the Free State, sued the Attorney-General, claiming a declaration as to their rights. On appeal the Privy Council, reversing the decision of the Supreme Court of the Irish Free State, held that the appellants were entitled to such a declaration by an action against the Attorney-General as in *Dyson v. Att.-Gen.*, [1911] 1 K. B. 410; [1912] 1 Ch. 158; and varied the amounts which had been granted as retiring allowances which they were entitled to have assessed in accordance with the official cost-of-living figures.

Article 11 of the Irish Free State Agreement, 1921, provided

that the Treaty was not to apply to Northern Ireland until after one month of its ratification, and section 12 provided that the Agreement was not to apply at all if, within the month, an address was presented to His Majesty by both Houses of the Parliament of Northern Ireland. An address was so presented, and consequently the Agreement has never applied to Northern Ireland, whose Constitution is thus contained in the unrepealed portions of the Government of Ireland Act, 1920. Article 12 of the Agreement also provided that a commission consisting of three persons, "one appointed by the Government of the Irish Free State, one by the Government of Northern Ireland and one to be chairman to be appointed by the British Government, shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographical conditions the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission."

The Government of Northern Ireland refused to appoint a member of the Commission on the grounds that it had not been consulted in the making of the Agreement with Sinn Fein and wished to be no party to putting the Agreement into effect. The British Government then proposed to appoint a member to act for the Government of Northern Ireland, who denied that the British Government had such power.

The dispute was then referred to the Judicial Committee of the Privy Council under section 4 of the Judicial Committee Act, 1883 (see p. 82; see also *Times*, August 1, 1924), in the form of the following questions:—

"1. Is it competent for the Crown, acting on the advice of Ministers of the United Kingdom, in the absence of a Commissioner appointed by the Government of Northern Ireland, to appoint?

"2. Whether, if the answer to Question No. 1 is in the negative, it is competent for the Crown, acting on the advice of Ministers of the United Kingdom to instruct the Governor of Northern Ireland in default of advice from his ministers to make

the appointment, and for the Governor of Northern Ireland to act upon that Instruction."

The Privy Council answered both questions in the negative. They held that the words "Government of Northern Ireland" in Article 12 (*cit. supra*) could only mean the Governor of Northern Ireland acting as the mouthpiece of his ministers responsible to the Legislature.

The next stage in giving effect to the Treaty and Constitution was the passing of the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, c. 2), which provided :—

1. (Section 1, sub-section 1.)—The Government of Ireland Act, 1920, was to cease to apply to any part of Ireland except Northern Ireland, while (section 1, sub-section 2) in place of the powers of the Lord Lieutenant under the 1920 Act, there was to be a Governor of Northern Ireland.

2. (Section 6, sub-section 1 (a).)—The Act gave the Crown power by Orders in Council to make any such adaptation of any Acts so far as they related to any of His Majesty's dominions other than the Irish Free State as might appear necessary or proper as a consequence of the establishment of the Irish Free State.

3. (Section 4.)—The Commissioners of Customs and Excise might make regulations with reference to the importation and exportation of any goods into and from Northern Ireland otherwise than by sea or in aircraft.

4. There were various provisions for the transfer of the Post Office Savings Bank to the Irish Free State, the provision of cottages for ex-service men in Ireland, provision as to relief from double taxation, etc.

Under the provisions of section 6, on March 27, 1923, an Order in Council was made providing that the expression "British Isles" appearing in any enactment prior to 1922 was to be construed as exclusive of the Irish Free State.

The effect of this was to apply all legislation referring to colonies generally to the Irish Free State, *e.g.*, the Colonial Laws Validity Act, 1865, etc.

Under this Order in Council the Irish Free State was to be

excluded from the operation of all enactments applying to Ireland prior to 1922, with certain specified exceptions.

The Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), was excepted from the Acts which were thus repealed, and thus continued in force in Southern Ireland. The Restoration of Order in Ireland Act, 1920, virtually re-enacted in regard to Ireland the Defence of the Realm legislation made by Orders in Council under the Defence of the Realm Consolidation Act, 1914, which came to an end in Great Britain on the conclusion of the War. Under Regulation 14B of D.O.R.A. the Home Secretary in England was empowered to arrest and detain without trial in England any person whose behaviour was calculated to disturb the restoration of order in Ireland. The Restoration of Order in Ireland Act was passed on August 9, 1920, and regulations contained in 14B were extended to Ireland by an Order in Council on August 13, 1920, while the rebellion was going on in Ireland. In *Brady v. Gibb* (1921), 37 T. L. R. 854, 975, Edward Mark Brady, a young Irishman resident about five years in England, had been arrested at Wallasey in Cheshire, England, under the provisions of Regulation 14B, and a rule *nisi* was sought for the issue of a writ of *habeas corpus* on the ground that the Order applied only to Ireland. It was held by the Court of Appeal that His Majesty having power to issue Regulations under the Defence of the Realm Consolidation Act, 1914, the Restoration of Order in Ireland Act, 1920, was not excluded from this country and the rule was discharged and a writ of *habeas corpus* was refused.

In *Secretary of State v. O'Brien* (1923), L. J. 331; [1923] A. C. 603, the Home Secretary, William Bridgeman, had on March 7, 1923, issued an order for the internment of Art O'Brien and for his conveyance to Dublin on the grounds that he was a Republican rebel plotting in England against the peace of the Irish Free State. The Home Secretary purported to act under the powers conferred by the Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), and O'Brien was arrested on March 11 and deported to Ireland. An April 10, 1923, application was made *ex parte* on behalf of the respondent, Art O'Brien, to a Divisional Court for a rule *nisi* for writ of *habeas*

*corpus* directed to the Secretary of State, and on May 9 the rule was made absolute on the ground that the Act of 1920 had been abrogated by subsequent legislation.

The Divisional Court held that the Irish Free State Executive was, in consequence of Articles 1 and 2 of the Agreement (made a statute by the Irish Free State (Agreement) Act, 1922), as independent of the Imperial Executive as Canada. Therefore the Home Secretary had no longer any power in Ireland and could not give effect to the whole of the Regulation. He, in other words, could not release Art O'Brien who was now interned in Ireland.

It further held that the Irish Free State was a colony in virtue of the Order in Council of March 27, 1923, and therefore that no writ of *habeas corpus* could issue out of England into the Irish Free State in virtue of the Habeas Corpus Act, 1862, which now applies to Ireland as a colony.

That after the establishment of the Irish Free State, Regulation 14B and the Order in Council of August 13, 1920, which applied it in *Brady's Case* (*cit. supra*), became quite inconsistent with the Constitution of the Irish Free State, Article 73 of which provides : " Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstat Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

Article 2 provides : " All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstat Eireann) through the organisations established by or under, and in accord with, this Constitution."

And Article 51 provides : " The Executive Authority of the Irish Free State (Saorstat Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of

Canada, by the Representative of the Crown. There shall be a Council to aid and advise the Government of the Irish Free State (Saorstat Eireann) to be styled the Executive Council. The Executive Council shall be responsible to the Dail Eireann and shall consist of not more than seven nor less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council."

Articles 2 and 51 thus set up an Executive and the Restoration of Order in Ireland Act, 1920, was inconsistent with these Articles. The Home Secretary therefore had no longer power to detain anyone in Ireland after the passing of the Irish Free State Constitution Act, 1922. Even if he could still arrest, the order would be invalid as the regulation implied a power to release. The Home Secretary could not release a person sent to Ireland, neither could the English Courts release him. Another part of the Regulations provided that the person interned might be required to reside in the British Isles. But Ireland under the Consequential Provisions Act, 1922, by this time was no longer part of the British Isles. The writ was therefore granted against the English Home Secretary. The Home Secretary appealed to the House of Lords and the hearing of the appeal was expedited, so that the respondent had not been in fact discharged from custody when the appeal came for argument. The House of Lords held that in their opinion section 3 of the Appellate Jurisdiction Act, 1876, did not give an appeal to the House of Lords in a case in which the Court of Appeal had granted a writ of *habeas corpus* and dismissed the appeal.

**The Constitution of the Irish Free State—Saorstat Eireann.**—The Constitution as drafted by the Constituent Assembly in the Provisional Parliament of Ireland was accepted by the Imperial Government and passed as the Irish Free State Constitution Act, 1922 (12 & 13 Geo. 5, c. 1). This was the first Act passed by the Irish Free State and is cited in the Irish Statutes as the Constitution of the Irish Free State (Saorstat Eireann), No. 1, 1922. Section 1 decrees that the Constitution as set out in the First Schedule of eighty-three Articles shall be the Constitution of the Saorstat Eireann, and section 2 provides that the Constitution is to be construed in reference to the Articles of

Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule. As the Treaty had already been given the force of law by the Irish Free State Agreement Act, 1922, this provision in the Constitution Act gave it a double statutory force.

The Act provides in the preamble that "if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall to the extent only of such repugnancy be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively do all such other things as may be necessary to implement the Scheduled Treaty."

Section 4 provides : "Nothing in the said Constitution shall be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions."

And under section 3 the Parliament of the Irish Free State is given power to adopt Acts applicable to other dominions.

Article 12 of the Constitution provides : "The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas." The words "sole and exclusive" are peculiar to the Irish Constitution, but as the Imperial Parliament has reserved the right to make laws under section 3 (*cit. supra*), they would seem to be mere surplus verbiage.

Article 6 provides : "The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained the High Court and any and every Judge thereof shall forthwith enquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or Judge without delay, and to certify in writing as to the cause of the detention, and such Court or Judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with law.

"Provided, however, that nothing in this Article contained shall be invoked to prohibit control or interfere with any act of the military forces of the Irish Free State (Saorstat Eireann) during the existence of a state of war or armed rebellion."

After the passing of the Constitution Act hostilities still continued between the Irregulars of the Irish Republican Army and the Free State Forces, and a number of persons were interned by the military authorities without any specific charge being made against them. In May, 1923, a proclamation appeared in the *Irish Times* signed by Eamonn de Valera, President, and Frank Aiken, Chief of Staff, of the Irish Republican Army, against whom the Free State Army had been waging war, ordering members of the Irish Republican Army to cease acts of warfare. On January 14 Nora Connolly O'Brien had been taken into custody and detained in the North Dublin Union Military Internment Camp where she was kept without any form of trial until June 15, when an affidavit was filed by her sister setting out the facts and asking for a writ of *habeas corpus* to be granted. (*The King v. Military Governor of the Military Internment Camp, North Dublin Union and the Minister of Defence*, [1924] 1 Ir. R. 32 (C. A.)) Malony, C.J., on July 31, 1923, held that it having been proved that hostilities had ended, Article 6 of the Constitution applies without the reservation at the end of it, and he ordered the release of Mrs. O'Brien by writ of *habeas corpus*. This was tantamount to a declaration that all the prisoners then interned were thereafter illegally detained. On August 1, the day following the decision, the Government introduced and passed the Public Safety (Occasional Powers) Act, No. 28, 1923, which received the King's assent on the same day. By section 1 of the Act the Executive Minister was empowered to arrest and detain in custody, in any place within the Saorstat, any person in respect of whom the Minister would certify that he was satisfied that there was reasonable ground for suspecting such person as being or having been connected or concerned in the commission of certain offences against the public safety of the State set out in the schedule to the Act, or in respect of whom the Minister received a report from the military authorities that the detention of such person

was a matter of military necessity. On August 2, the day after the Public Safety Act was passed, the State claimed to make a return to the writ of *habeas corpus* under this section, on the grounds that the public safety would be endangered by the release of Mrs. O'Brien and the other rebels then interned.

It was submitted for the interned that the return should be quashed on the grounds that the Public Safety Act, passed into law in one day was in contravention of Article 47 of the Constitution. This provides that "Any Bill passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the written demand of two-fifths of the members of Dail Eireann or of a majority of the members of Seanad Eireann presented to the President of the Executive Council not later than seven days from the day on which such Bill shall have been so passed or deemed to have been passed. . . . These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety." In other words, the Public Safety Act had not been regularly passed because seven days had not been allowed in which a petition might have been presented against it, and the Court of Appeal held that the return was bad for this reason, and that, in order to get rid of the condition, a declaration of both Houses that the Bill was necessary for the immediate preservation of the public health or safety had not been made. Thereupon, the next day, August 3, 1923, both Houses passed the Public Safety (Emergency Powers) Act, No. 2, Act No. 29, 1923. This contained the necessary declaration by both Houses and re-enacted for six months the abortive Act, No. 28 of 1923.

Besides Article 6 of the Constitution already referred to there are several other Articles guaranteeing the safety of the subject. Article 9 provides for free speech of the subject and right of peaceful assembly. Article 72 provides: "No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable by law before a Court of summary jurisdiction, and in the case of charges for offences against military law triable by court-martial or other military tribunal."

And Article 70 provides : " No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such Military Tribunals as may be authorised by law for dealing with military offenders against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with regulations prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction."

And Article 71 provides that a member of the armed forces of the Saorstat Eireann not on active service shall not be tried by a military tribunal unless his offence has been brought within the jurisdiction of courts-martial or other military tribunal by any code of laws or regulations for the enforcement of military discipline approved by the Oireachtas.

From 1916 there had been engaged against the forces of the English Crown three bodies of irregular armed forces, the Irish Volunteers, the Irish Citizen Army and the Irish Republican Army. These forces were collectively known as the " Oglaigns Eireann " (Soldiers of Ireland). Some, upon the conclusion of the treaty, were retained in the service of the Saorstat Eireann and became its standing army, and others laid down their arms and returned to their homes. In 1923 the Army Pensions Act, No. 26, was passed by the Irish Free State, providing pensions for all members of the irregular forces employed in the rebellion who had been disabled as a consequence. On August 3, 1923, the Defence Forces Act, No. 30, was passed, which made provision for the retention of the loyal remnant of the I. R. A., or National Army, as it was then called, to be thereafter known as " the Defence Forces." A portion of the I. R. A. which had remained for a time under the command of de Valera and other leaders who would not accept the treaty, had carried on an irregular warfare against the National Army until de Valera proclaimed a cession of hostilities in May, 1923, after which it disbanded itself. The Defence Forces Act, No. 30, was intended

to last for only a year, but it has since been renewed, and has become the "Army Act" of the Saorstát.

**Other Features of the Constitution of the Irish Free State.**— Article 51 (see p. 217) provides for the Executive Authority to be vested in the King, and to be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown. The Government is to be advised by an Executive Council (another name for the Ministry) which is to be responsible to the Dáil Éireann, and shall consist of not more than seven or less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council. This is the only instance where the convention that the Ministers shall be chosen by the Prime Minister is expressly provided for in the Constitution of a Dominion. All Ministers must be members of the Dáil Éireann and may not be members of the Upper House or Senate. Article 52 provides : "Those Ministers who form the Executive Council shall all be members of Dáil Éireann and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance." In contrast to this, section 64 of the Australian Constitution Act, 1900, provides that no Minister of State shall hold office in Australia for a longer period than *three* months unless he is or becomes a senator or a member of the House of Representatives. And section 14 of the South Africa Act, 1909 : "No Minister shall hold office for a longer period than three months unless he becomes a member of either House of Parliament."

Article 53 in substance provides that the President of the Council, *i.e.*, the Prime Minister, is to be appointed on the nomination of the Dáil Éireann (or House of Commons). He is to nominate a Vice-President to act in case the President shall die, resign, or be permanently incapacitated until a new President shall have been chosen. This provision is unique. In all other Dominion Constitutions the Prime Minister is appointed by the King, though there is a convention that a Prime Minister is not to be appointed who cannot command a majority in the

Lower House. The other Ministers, though appointed on the nomination of the Prime Minister, can only be so appointed with the assent of the Dail Eireann. The Ministry is to retire if it ceases to retain the support of a majority of the Dail Eireann, but the President and such Ministers shall continue to carry on their duties until their successors shall have been appointed. Here, again, another constitutional convention is put into writing that occurs in no other Dominion Constitution. Article 54 provides : "The Executive Council shall be collectively responsible for all matters concerning the Departments of State administered by Members of the Executive Council. The Executive Council shall prepare estimates of the receipts and expenditure of the Irish Free State (Saorstat Eireann) for each financial year, and shall present them to Dail Eireann before the close of the previous financial year. The Executive Council shall meet and act as collective authority." Articles 55 and 56 provide for the nomination by the Dail Eireann on the recommendation of a Committee of the Dail Eireann of Ministers who are to be impartially representative of the Dail Eireann, but who are not to be members of the Executive Council, and are to be individually responsible to the Dail Eireann and are to hold office for a fixed term, though they may be removed by the Dail Eireann for stated reasons.

Under Article 4 the national language is to be the Irish language, but the English language is to be equally recognised as an official language.

**The Seanad Eireann.**—The Upper House or Senate consists of sixty members chosen by a mixed panel made up of members of the Dail Eireann, the existing Senate and former members of the Senate. Members are chosen on the grounds that "they have done honour to the Nation by reason of useful public service or that, because of special qualifications or attainments, they represent important aspects of the Nation's life." They must be over thirty-five years of age and hold office for twelve years. The Senate is entitled to be informed, to advise and warn, but it has no absolute veto. It can only hold up legislation for one hundred and seventy days.

**The Dail Courts.**—The British system of the judiciary had consisted of :

(1) Petty Sessions Courts presided over by unpaid magistrates who had a summary jurisdiction, with a small civil jurisdiction limited mainly to debts under £2, cottier tenancies and small tenancies in towns.

(2) County Courts presided over by a Judge who was a barrister of at least ten years' standing, and had a similar but rather more extensive jurisdiction than an English County Court Judge.

(3) The Supreme Court, consisting of the High Court of Justice and the Court of Appeal. The High Court was under the presidency of the Lord Chief Justice; the Court of Appeal under the presidency of the Lord Chancellor.

(4) The Court for Crown Cases Reserved, which occasionally sat as a Court of Criminal Appeal.

As part of the programme of hostilities carried out against the English authorities the Petty Sessional Courts were besieged by the rebels, and litigants were threatened with violence who resorted to them. Many of the county magistrates resigned their commissions, and the administration of justice in outlying districts became impossible. The rebels set up Courts of their own and only the High Court in Dublin continued to function with any degree of continuity.

Article 68 of the Constitution provides that the Judges are to be appointed by the Representative of the Crown on the advice of the Executive Council, and they are not to be removable except for stated misbehaviour or incapacity, and then only by resolution passed by both Dail and Seinad Eireann. Article 69 makes Judges ineligible for the Legislature and incapable of holding any other office or emolument. Article 65 gives the High Court sole jurisdiction in deciding the validity of any law having regard to the provisions of the Constitution.

Article 66 provides : “ The Supreme Court of the Irish Free State (Saorstat Eireann) shall with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The

decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever :

“ Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.”

Article 64 provides for the establishment of Courts of First Instance and a Court of Final Appeal, to be called the Supreme Court. Article 75 provided for the administration of justice by the then existing Petty Sessional Courts and County Courts during the transitory period.

As a result of a report of a Committee which considered the defects of the existing system, the Courts of Justice Act, No. 10, 1924, was passed. By its provisions :

(1) The Petty Sessions Court is replaced by a District Court, presided over by a paid District Justice, who must be a practising barrister or solicitor of six years' standing. Justices of the Peace, now called Peace Commissioners, take no part in its deliberations and have no judicial powers. The jurisdiction of the District Court is similar to that of the former Petty Sessions Court, but its civil jurisdiction has been somewhat extended to £25 in actions on contract and £10 in actions of tort.

(2) The County Court has been abolished, and in its place the County Court area has been divided into eight “ Circuit Districts,” on a population basis of about 40,000 inhabitants. Over each of these areas the Judge is called a Circuit Judge. His jurisdiction extends over all claims of debt or damages up to £300, while on the equity side he can deal with practically all questions of administration, mortgage, etc., over assets up to £1,000. He has a winding-up jurisdiction over companies up to a capital of £10,000. On the criminal side he can try all felonies and misdemeanours save murder, high treason, and piracy.

(3) The High Court consists of six Judges, one of whom, named the President of the High Court, presides. The Court sits at Dublin and its Judges also preside at the Central Criminal Court in Dublin, where all serious crime in the country is tried.

It has original jurisdiction in all questions of the validity of statutes as being within or without the Constitution, and also in what were formerly called Crown Office cases.

(4) The Supreme Court of three Judges, of whom the President is the Chief Justice, has appellate jurisdiction of the Court of Appeal in the English system.

(5) Under the special jurisdiction of the Chief Justice are the matters formerly under the Lord Chancellor such as lunatics, minors, solicitors, notaries, public, and commissioners of affidavits.

(6) The Court of Criminal Appeal sits permanently in Dublin. It consists of three Judges, one of whom is the Chief Justice or Judge of the Supreme Court, the others being members of the High Court Bench. In special cases the Chief Justice can request additional members of the High Court or Supreme Court to attend.

(7) The new Central Criminal Court is merely a term applied to the Judge of the High Court, to whom is assigned the duty of acting as such Court for the time being.

## CHAPTER X.

**COLONIES WHICH POSSESS RESPONSIBLE GOVERNMENT SUBJECT TO A RESERVATION OF CERTAIN MATTERS FOR THE IMPERIAL GOVERNMENT—THE CONSTITUTIONS OF MALTA AND NORTHERN AND SOUTHERN RHODESIA.**

**The Constitution of Malta (a)—History of the Constitution.**

The present Constitution of Malta dates from April 14, 1921. It may be described as a "self-governing colony with certain subjects reserved." That is to say, it has a dual system of government, consisting in an elected Legislature and responsible Government which is capable of legislating on all matters except such as are expressly reserved, and, side by side with its indigenous Government, it has a Crown Colony Government in all matters which are reserved.

Malta became part of the British Empire in 1800, when it voluntarily placed itself under the sovereignty and protection of the British Crown. Malta was administered by a Governor from 1800 to 1835, when an advisory council was appointed consisting solely of official members. In 1849 a further step was made in the direction of responsible government by the introduction of elected members, but the official members still remained in a majority until 1887. In that year the elected members were increased to form a majority. The change did not work well; the elected members refused to co-operate with the nominated members and the old regime was restored in 1903. The elected members thereafter, as a protest against the restrictive constitution, refrained from voting, so that the Government, until 1919, was carried on in reality by a Governor and nominated members of the Council.

At the end of the war the Maltese showed signs of settling their racial differences and a National Assembly was convoked,

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(a) Cmd. 1321. See also Article: "The Constitution of Malta," by C. J. Colombos, Journal of Comparative Legislation and International Law, February, 1925.

which framed a draft Constitution. Their demand for a popular form of government was recommended by Lord Plumer to the Imperial Government, which sympathised with the national aspirations of the Maltese, but at the same time was unwilling to allow control of such parts of and services in the island as would weaken the Imperial command over it as a naval station of primary strategic importance to the Empire. When Letters Patent were issued in 1921 for the grant of responsible government in the island a solution of the difficulty of reconciling these divergent interests was found by setting up a diarchical system which is, in many respects, peculiar to Malta, although the machinery by which the concurrent jurisdictions are kept in motion at the same time has since been borrowed with some success in the framing of the Constitution of Southern Rhodesia.

**The Diarchical System.**—The Constitution of Malta is contained in the Letters Patent of 1921, which have the same effect as the surrender of the Prerogative by Imperial Act, because, for the first time, the Crown has not reserved any power to legislate further.

The elective Government set up under the terms of the Patent has control of all matters except such as are expressly reserved, and side by side with this elective Government, the Crown Colony Government has jurisdiction in all matters which are expressly reserved. All matters of local and domestic concern are thus under the control and responsibility of the Maltese elective Government. Matters affecting, on the other hand, the defence of the Empire, its foreign relations and the position of Malta as the premier naval station in the Mediterranean are reserved to the Imperial Government. The demarcation between the two classes of subjects is clearly defined in Article 41 (1), which provides : "The Government has power to make laws for peace, order and good government with the following limitations :

" The said power to make laws shall not extend to matters hereinafter referred to as reserved matters, touching public safety and defence of our Empire, and the general interests of our subjects not resident in Malta, and in particular the following specified subjects : Immigration, naturalisation, island defences, aerial navigation, trade with any place out of the island, except

so far as trade may be effected by the exercise of the power of taxation given to the legislature by these our letters patent."

To prevent conflict between the Imperial Government and the Maltese Government, in construing this Article, the power of deciding whether a subject is or is not within the list of reserved subjects is vested in the Governor, and, unlike what is provided in this respect in the Constitutions of other self-governing colonies, such questions cannot be brought before the judicature by any form of process in the Law Courts.

**Naturalization.**—On the subject of naturalization the Maltese held strong views that it should not be included in the list of reserved subjects. The Imperial Colonial Secretary was not, however, willing to include Malta in the list of self-governing dominions which can, by adopting the Naturalization Act, 1914, grant Imperial naturalization, and it was considered impracticable to allow Malta to complicate the subject of British naturalization by passing naturalization laws of her own. As regards naturalization Malta is therefore in the same position as a British colony without self-government. That is to say :

- (1) It cannot pass its own Naturalization Acts.
- (2) It cannot adopt Part II of the Act of 1914 and thereby give the Governor of the Colony power to confer naturalization ;

but the Governor himself, as distinguished from the Government of the Colony, may as Imperial Agent grant a certificate of naturalization subject to the approval of the Imperial Secretary of State.

Apart from questions arising out of the reserved subjects, religious toleration, the language question, and the civil list, which it cannot touch, the Maltese Colonial Government has a wide sphere of legislation and may alter any of the provisions of the Constitution or any Order in Council applicable to Malta, but a repeal or alteration must in either case be passed by a two-thirds majority in each house.

**Recognition of Three Official Languages.**—The Constitution of Malta provides that all debates and discussions in Parliament may be recorded in either English or Italian, at the option of the

speaker, but that all copies of laws and orders shall be printed in both English and Italian. Italian is retained as the official language of the Law Courts, but both English and Italian are taught in the universities and schools. The existence of Maltese as an official language is also recognised to some extent, and instruction in the elementary schools is to be given in Maltese.

**Freedom of Conscience.**—It is provided by Article 56 : “ (i) All persons in Malta shall have full liberty of conscience and religious worship. (ii) No person is to be subject to any disability for religious profession.”

This is a constitutional limitation on the powers of the Legislature which has a parallel in Article 8 of the Irish Free State Constitution and in section 116 of the Australia Constitution Act, 1900.

**Local Common Law Preserved.**—The Common Law of Malta is based upon Roman Law modified by the Napoleonic Code and local legislation prior to 1800. Appeals lie from the Malta Court of Appeal to the Judicial Committee of the Privy Council, either by special leave or as of right on conditions as to the nature and value of the causes laid down in the Order in Council of November 22, 1909.

**The Governor.**—“ The dualism or diarchy established in Malta is united in the person of the Governor, to whom two different capacities are assigned. In the first place he is the constitutional head of the autonomous government of Malta, acting on the advice of Ministers directly responsible to the Maltese Parliament. In the second place he is the supreme executive and legislative authority in all matters reserved to the Imperial Government. Fundamentally, the Governor is the official appointee and representative of the Crown to which he is solely responsible and by whose instructions he is bound. The existence, therefore, in one person of two quite separate functions presents, in a diarchical system of government, constitutional difficulties of great magnitude, although the system may prove successful in actual practice. It is, of course, too early as yet for any expression of opinion as to the working of the new machinery ” (b).

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(b) “ The Constitution of Malta,” C. J. Colombos, Journal of Comparative Legislation and International Law, February, 1925, p. 94.

Article 43 enables the Governor to certify that a bill introduced into the Legislature or proposed to be introduced into either House, or an amendment to such a Bill, affects a matter reserved for the Imperial Government, and thereafter the Governor may direct that no further proceedings shall be taken. Such a veto on the powers of a representative government is without parallel in the constitutions of any of the self-governing colonies and will probably give rise to difficulties in the near future. The power of veto is subject to the right of either House by resolution to submit a request through the Governor to the Secretary of State for his decision as to whether a Bill in question comes within the prohibition of reserved subjects. In this way there is an appeal from the Governor to the Imperial Parliament, but the Courts are excluded from determining such questions.

**Governor's Control over Reserved Subjects.**—The Letters Patent reconstitute the office of Governor in Council in regard to reserved matters. As already pointed out, he has thus a dual character in his capacity of Governor. He acts as a constitutional sovereign in regard to ordinary matters: he acts alone without either ministry or Legislature in reserved matters, but such ordinances may be disallowed by the Imperial Government.

To assist him in making decisions in connection with reserved subjects a "Nominated Council" is to be appointed by the Imperial Government, or appointed by the Governor subject to the approval of the Imperial Government. The "Nominated Council" as such will be distinct from the responsible ministry who represent the government of the country in the ordinary subjects within the purview of the Legislature. It has been foreseen that friction may arise between the body of the Governor and Nominated Council which is responsible for Ordinances affecting reserved subjects, and the Governor and Ministry representing popular government in the non-reserved subjects. Article 17 accordingly provides that the Governor may summon a joint meeting of the Executive Council and the Nominated Council to sit together for the consideration of matters not within the exclusive responsibility of the Executive Council (or Ministry). The joint meeting of Nominated and

Executive Councils is to be known as the "Privy Council," and by reason of the inclusion in it of members of the Ministry, Ordinances relating to reserved subjects may in practice be in entire accord with the wishes of the responsible Government, and it is hoped friction between the Executive and Nominated Council will be thus obviated.

Article 64 provides that appointments to judgeships and high offices in the Civil Service, other than ministers under the Crown, shall be made by the Governor in Council, that is to say, by the Governor acting as a constitutional sovereign with the advice of the ministry. Judges are to be removable only on a vote of both Houses of the Legislature.

*Ordinances affecting reserved subjects.*—"Ordinances enacted by the Governor of Malta," unlike bills, can never be assented to by the Governor without the pleasure of the Crown being first taken, and the Crown has reserved the right of legislating on any of the reserved subjects by direct Orders in Council.

Article 2 provides that the Governor shall preside not only at meetings of the Nominated Council, but also at the meetings of the Executive Council. In most colonies the Governor does not attend meetings of the colonial ministry on the analogy that the King does not attend meetings of the English cabinet which is presided over by the Prime Minister. In view of his dual capacity, the Imperial Government insisted that the Governor should be cognisant of the policy of both the popular Government in ordinary subjects, and of the Nominated Council over reserved subjects.

Article 11 provides that the Governor shall be guided by the advice of the Executive Council with regard to all matters within the jurisdiction of the Legislature. "But if he shall see sufficient cause to dissent from the opinion of the Council, he may act in opposition to the Council in any matter whatever." In such cases he is immediately to report to the Imperial Government.

Such a limitation on the powers of the Legislature is extremely rare. There is nothing to such effect in the Instructions to the Governors of Canada, Australia, or South Africa, although under section 5 of the New Zealand Instructions, it is provided that the Governor shall be guided by the advice of the

Executive Council, " but if in any case he shall see sufficient cause to dissent, he may act in opposition to the opinion of the said Council, reporting the matter to us with reasons without delay."

**The Maltese Parliament.**—The Parliament consists of two chambers called the Senate and Legislative Assembly.

The Senate consists of seventeen members, seven of whom are elected by proportional representation in the two divisions of Malta and Gozo. The remaining ten are special members nominated to represent the clergy, the nobility, the graduates, the Chamber of Commerce and the Trade Union Council. The Senate holds office for six years. Articles 61, 62 and 63 (1) provide that money bills are to originate in the lower House and they must be accompanied by a recommendation of the Crown (*i.e.*, the proposal of a competent minister). The Senate has no power of initiation of money bills and can only make recommendations. The Senate may accept or reject a money bill or return it to the Legislative Assembly with recommendations, but may not alter it.

The Legislative Assembly consists of thirty-two members, returned in groups of four by each of the eight electoral districts. Election is by proportional representation. The franchise includes all males over twenty-one who can read or write or are worth £5 per year. There is no female franchise. An unwritten convention of the English Constitution is embodied in writing that there shall be annual parliaments. Any male person having a vote may be elected to the Legislative Council, which is elected for three years. Article 31 (c) provides that " no holder of any office for profit under the Crown other than the office of Minister as hereinafter defined, shall be capable of sitting in the legislature." Article 33 provides that election disputes are to be decided by the Courts, and not by the House itself. Article 42 deals with disagreements between the two Houses of the Legislature. It provides that if a bill is rejected by the Senate in two subsequent sessions, a joint sitting of both Houses may be convened or, alternatively, the Governor may dissolve either or both Houses, after which the bill is again introduced in the Legislative Assembly and, if again rejected by the Senate, a joint sitting is

convened and the bill then becomes law provided it is passed by a two-thirds majority.

*The Cabinet and Ministry.*—Article 54 provides that the Governor may appoint ministers not exceeding seven in number as heads of specified departments. This limitation of the number of ministers is peculiar to Malta. Every minister is to be a member of one of the two Houses and does not vacate his seat upon appointment. Every minister has the right to sit and speak in both Houses, but is entitled to vote only in the House to which he belongs.

The Constitution embodies another hitherto unwritten usage of the British Constitution in so far as the office of Prime Minister is officially recognised. It is provided that the head of the ministry shall be the official channel of communication:—

- (a) between the Governor and the Ministry;
- (b) between the Ministry and the Legislature.

But as has already been stated, the meetings of the Cabinet are presided over, not by the Prime Minister, but by the Governor. In other respects the relations between the Governor and his ministers and the ministry and the Legislature "shall be regulated as nearly as possible by the constitutional practice obtaining in like matters in our United Kingdom." For instance, the ministry is to resign upon being defeated on a vote of want of confidence or upon failing to pass an important measure.

*Northern and Southern Rhodesia.*—Until April 1, 1924, Rhodesia was administered by the British South Africa Company as a protectorate. The Crown was represented by a High Commissioner, aided by an Advisory Council on all draft proclamations affecting Europeans. By an agreement dated September 28, 1923, between His Majesty and the Company, the administration of the South Africa Company came to an end. Southern Rhodesia was formally annexed in July, 1923, and by Letters Patent was granted a Constitution in September, 1923 (see *London Gazette*, September, 1923, and *Statutory Rules and Orders*, 1923, p. 1077), and Northern Rhodesia became a separate protectorate. By the Northern Rhodesia Order in Council, 1924, the administration of Northern Rhodesia was vested in a Governor

and Commander-in-Chief, assisted by an Executive Council, which subsequently, by Order in Council of February 26, 1924, was made to consist of the Chief Secretary to the Government, the Attorney-General, the Treasurer, the Secretary for Native Affairs, and the Principal Medical Officer, who were to be *ex-officio* members, and such other persons holding office in the public service of the territory as the Governor in pursuance of instructions from His Majesty might from time to time appoint, and further of such other persons (if any) not holding office in the public service of the territory as the Governor in pursuance of instructions from His Majesty might appoint, who should be styled unofficial members of the Executive Council. Where the Governor is anxious to obtain the advice of any person on some special matter he may on such special occasion include him as an extraordinary member of his Council.

By the Northern Rhodesia (Legislative Council) Order in Council, 1924, the Legislative Council was made to consist of the Governor, the five *ex-officio* members, nominated official members not exceeding four in number, and of such other persons as should be co-opted for that purpose, and that, pending their election, there should be five nominated unofficial members.

A High Court of Northern Rhodesia was set up with complete jurisdiction, civil and criminal, over all persons in the colony, subject to the provisions of the Order in Council with regard to native law and custom. In respect of suits involving more than £500 there is a right of appeal to the Privy Council.

The Legislative Assembly has full power of legislation over all persons within the protectorate with the exception that it must pay respect to native law and custom by which the civil relations of native chiefs, tribes or populations under His Majesty's protection are regulated.

In minor criminal matters the Magistrates' Courts have full control over Europeans, and the natives are within the jurisdiction of Native Commissioners' Courts. In so far as such customs are not repugnant to natural order and justice, civil suits between natives are to be governed by native law and custom, and the Courts are to be aided by native assessors in regard to native customs.

Southern Rhodesia became a self-governing colony in September, 1923, shortly before the opening of the Imperial Conference in that year. It cannot be classified as a self-governing dominion because its Constitution contains provisions similar to those inserted in the Constitution of Malta. But whereas in the Constitution of Malta the Legislature cannot legislate at all on certain reserved subjects (see p. 229), the constitutional position in Southern Rhodesia is that there are no subjects absolutely outside the purview of the Legislature, but bills dealing with certain subjects must be held back for the assent of the Governor who must not assent until His Majesty, through the Colonial Secretary of State, has approved. Section 28 of the Order in Council (see Statutory Rules and Orders, 1923, p. 1077) contains a list of subjects which cannot be dealt with save subject to the approval of the Imperial Government obtained in this way. The bulk of these subjects relate to native rights and property, which thus cannot be interfered with by the Southern Rhodesian Legislature until the approval of the Imperial Government has been obtained. In other respects the Constitution approaches responsible government as there is no provision for a nominated Legislative Council as in Malta.

The Constitution embodies in writing a number of conventions of the British Constitution. Section 16 provides for annual sessions of the Legislature; section 18 enables the Governor to prorogue the Legislature and dissolve it; section 22 provides that members of the Legislative Assembly shall be disqualified who accept any office of profit under the Crown or who are concerned in any Crown contracts. Under section 25 the Legislature may define the privileges of the Legislative Assembly, and section 26 contains a grant of legislative power in the usual form to legislate "for the peace, order and good government"; and it is expressly stated that this power shall include the power to repeal or alter any of the provisions of these Letters Patent, save those contained in section 28 (which defines what bills must be reserved for approval) and sections 39 and 47 (which deal with native administration) and section 35 (which deals with the Governor's salary).

## CHAPTER XI.

**THE CONSTITUTION OF INDIA—THE NATIVE STATES—BRITISH INDIA—THE SECRETARY OF STATE—THE GOVERNOR-GENERAL—THE GOVERNOR-GENERAL IN COUNCIL—THE LEGISLATURE OF INDIA—THE COUNCIL OF STATE—THE LEGISLATIVE ASSEMBLY—THE PROVINCIAL LEGISLATURES—THE GOVERNORS AND LIEUTENANT-GOVERNORS—THE RESERVED AND TRANSFERRED SUBJECTS—THE GOVERNORS' EXECUTIVE COUNCILS—THE GOVERNORS' MINISTERS—THE PROVINCIAL LEGISLATIVE COUNCILS.**

The term "British India," so far as regards any Act passed since 1889, means all territories and places within His Majesty's dominions which are, for the time being, governed by His Majesty through the Governor-General of India, or through any Governor or other officer subordinate to the Governor-General; and "India" means British India together with any territories of any prince or chief under the suzerainty of His Majesty exercised through the Governor-General of India, or through any Governor or other officer subordinate to the Governor-General.

**The Native States.**—The native States, which number approximately 675, contain over seventy million inhabitants who are not British subjects. The native States are protected territories whose administration is mostly left in the hands of the native rulers; the inhabitants are not directly subject to British jurisdiction and do not pay revenue to the British Crown. The relationship of a native State to the British Government in India is primarily governed by the treaty that in the past has been made between its native ruler and the representative of the British Crown. In addition to treaties there is a body of principles and precedents which govern administrative procedure and fill gaps in the numerous Orders in Council of the Governor-General, the interpretation of which rests with the British Government. Prior to 1857, if the issue of a native prince failed,

the British Government considered that it had a right to annex the State as vacant territory, but since the Mutiny the policy of the British Government in India in such circumstances has been to allow the native ruler to adopt a successor. The British Crown, on the other hand, has not hesitated to charge chiefs with heinous crimes before a specially constituted tribunal, or to depose native rulers for persistent misconduct and disloyalty, as for example the Gaekwar of Baroda in 1875, or even to break up the integrity of a State, as happened to the State of Jhalawar in Rajputana in 1897. Criminal jurisdiction in petty offences is left in the hands of the native administration, but sentences of death or imprisonment for life require confirmation by the British agents, and criminal jurisdiction over British European subjects is everywhere reserved for a British High Court.

In addition to the States governed by the native rulers, there are tribal territories which are inhabited by natives who acknowledge no ruler, but over which the British Government claims to exercise a vague suzerainty without having formally annexed them.

**British India.**—Even to-day it is not possible to understand comprehensively the system of government in India without a knowledge of the history of the conquest of India by the East India Company. Before 1784 it was an accepted constitutional doctrine that although the company had conquered India with its own resources, and had made treaties in its own name with the Indian princes, it held its possessions in trust for the Crown, and by acquisition inhabitants of its territories became British subjects. In 1784, Pitt set up a dual form of government, under which the ultimate control over the government of India was exercised by a minister of the Crown, called the President of the Board of Control. By the Government of India Act, 1858 (21 & 22 Vict. c. 106), the government, as a result of the Mutiny, was transferred from the company to the Crown, and its exercise vested in a newly appointed Secretary of State for India, aided by a Council of State for India. By the Royal Titles Act, 1876, passed by Disraeli's government, Queen Victoria accepted the title of Empress of India, which has since been continued.

*The Secretary of State.*—The Secretary of State for India in

London has charge of all business in the United Kingdom relating to India. The Secretary of State for India has inherited the powers of the former Board of Control, and all official communications between the Government and the Governor-General in India must be signed by him. He is usually the spokesman in Parliament to answer for the conduct of the Government in India, but in practice the control of the House of Commons over the administration in India is very slight. The Government of India Act, 1858, s. 52, provided that the details of accounts, receipts, and disbursements in India and in England should be laid before Parliament annually together with a report exhibiting the moral and material progress of the country. This is generally referred to as the annual discussion on the Indian Budget. Formerly the salary of the Secretary of State was provided in the Indian Budget and not out of the revenue voted by the Imperial Parliament. Consequently, apart from the short annual debate on the Indian Budget, the wisdom of the administration of the Government in India could not be challenged as in other branches of administration by the simple expedient of a resolution moved by the opposition to reduce the salary of a minister by two hundred pounds. By section 30 of the Government of India Act, 1919 (9 & 10 Geo. 5, c. 101), the salaries of the Secretary of State and his Under Secretaries are put on the revenues voted by Parliament, and thus Parliament has gained a measure of control over the Secretary's executive acts. Section 35 created the office of High Commissioner for India in London to whom the Secretary of State may delegate any of his powers or his powers in council in relation to making contracts on behalf of the Governor-General in Council or any local government.

*The Council of the Secretary of State for India.*—The constitution of the Council was originally provided for by the Government of India Act, 1858, but it has many times been altered by subsequent legislation. Its composition is now provided for in section 3 of the Government of India Act, 1915 (5 & 6 Geo. 5, c. 61). It consists of from ten to fourteen members appointed by the Secretary of State, nine of whom are intended to be persons who have served or resided in British India at

least ten years, and have left British India not more than five years since their appointment. They are appointed for seven years, but are eligible for reappointment for another five years. They receive a salary of £1,000 provided out of the revenues of India. It has been usual to include in their number at least two members, one a Mohammedan and one a Hindoo. Like Judges of the English High Court, they can be removed only by an address of both Houses of Parliament. The Council is an advisory body presided over by the Secretary of State, who has a casting vote. Every communication or order sent to the Governor-General in India is intended to be referred to the Council, but in cases of exceptional urgency, or where secrecy is required, as in making treaties with a native State or levying war, the communication need not be communicated to the Council. Members of the Council may record their reasons for dissenting from the majority in any resolution passed or action taken, and their reasons recorded in the minute book must forthwith be brought to the notice of the Secretary. The Secretary is not obliged to follow the advice of the majority, but, if he disregards it, he must record his reasons for so doing.

*The Governor-General.*—The Governor-General is appointed by His Majesty by warrant under the Royal Sign Manual. He is the representative of the Crown in India, and, although the practice is not authorised by statute, is usually referred to as the Viceroy. By custom the period of office is usually five years. Formerly if a Governor-General left India to return to Europe his office became vacant, but under the Government of India (Leave of Absence) Act, 1924, it is now possible for the Secretary of State in Council to grant leave of absence to a Governor-General (and to other high officials upon the recommendation of the Governor-General in Council).

*The Governor-General in Council.*—The duty of the Governor-General is to “superintend, direct, and control all acts, operations and concerns which relate to the government or revenues of India,” and in him is vested “the superintendence, direction and control of the civil and military government of India.” Under the Governor-General there are the local Lieutenant-Governors of the Provinces, who must “keep him

constantly and diligently informed of their proceedings and of all matters which ought in their opinion to be reported to him or on which he requires information.” But in all his executive acts the Governor-General is advised by an Executive Council, which consists of extraordinary members, the Commander-in-Chief in India, and, though not usually, the Governor of Madras or Bombay; and the ordinary members which at one time were limited to six (section 36 of the Government of India Act, 1915) but are now unlimited (section 28 of the Government of India Act, 1919), provided three of them must have been at least ten years in the service of the Crown in India and one must have been a barrister or advocate of at least ten years’ standing. Within recent years it has been usual to include some of the Indian party leaders in the Governor’s Executive Council.

The Governor-General is at liberty to refer questions to members of the Council who are placed in charge of various departments. In this way the Governor-General’s Council is analogous to the Cabinet of the Crown in England. There are nine departments: Foreign (in charge of the Governor-General in person), Home, Revenue, and Agriculture, Legislative Finance, Public Works (under the same member of council as Revenue and Agriculture) Commerce and Industry, Army (in command of the Commander-in-Chief), and Military Supplies. The Governor-General’s Council are, however, not responsible to the Indian Legislature, but only to the English Parliament (see section 141 of the Government of India Act, 1915). Although the Imperial Parliament has power “to control the proceedings of the Governor-General in Council, or to repeal or alter any law made by any authority in British India, or to legislate for British India and the inhabitants thereof,” the interference of Parliament is in fact very slight, and the initiative of legislation in practice still rests with the permanent officials in India who are ultimately responsible to the Secretary of State in London. By section 33 of the Government of India Act, 1919, it is contemplated that the Secretary of State will in time relax control of the superintendence of the Government of India which at present he holds. If he decides to relinquish any of his present powers over the control of ministers in regard to the transferred subjects

the rules relating thereto must be submitted to Parliament, and such rules can be annulled afterwards only by an address from either House being presented to His Majesty. In other words the power of superintendence over the transferred subjects (see pp. 245, 246) may in this way be relaxed by tacit assent of Parliament. With regard to relaxation of the control of the Secretary of State over the Government of India in regard to subjects "other than transferred subjects" the rules relating thereto must be submitted to both Houses of Parliament and their draft must be approved by both Houses before they come into force.

*The Legislature of India.*—Under sections 17—23 of the Government of India Act, 1919, the Legislature, in place of the former single Legislative Council, is made to consist of two Chambers, the Council of State and the Legislative Assembly.

*The Council of State.*—The Council of State, including the Executive Council, consists of sixty members of whom not more than twenty may be permanent officials appointed by the Governor-General. Thirty-three of the sixty are at present elected members. A President is appointed by the Governor-General, and the Governor-General has the right of addressing the Council of State, but may not be a member of it. The Council of State is appointed normally for five years, although it may be dissolved by the Governor-General at any time. For the purpose of returning the elected members India is divided into electoral districts which are similar to the electoral districts for the 100 elected members returned to the Legislative Council, save that they are larger and the franchise qualifications include a substantial property qualification and a personal qualification based on service and education.

*The Legislative Assembly.*—The Central Indian Legislative Assembly consists of 140 members, of whom forty are non-elected and 100 elected. The non-elected members include twenty-six official members. The constituencies into which the whole of British India is divided are based partly on territorial division and partly on communal division so as to secure representation of various religions and castes. The franchise for the Legislative Assembly varies in the particular provinces, but is

fairly extensive. The composition of the Legislative Assembly may be varied provided that at least five-sevenths remain elected members and not less than one-third of the other members are non-officials. The Legislative Assembly is elected for three years, but may be dissolved by the Governor at any time.

It is contemplated that every Act shall be placed before both Chambers, and normally, before it can become law, it must pass both Chambers. In the event of a disagreement between the two Houses a Conference may be held, and, in the last resort, the Governor-General may convene a joint sitting of both Chambers at which all votes will be equal. The Budget has to be laid before both Houses and the fiction of supplies being voted upon the advice of a member of a ministry is observed in so far as (see Government of India Act, 1919, s. 25) no resolution relating to the revenues of India may be introduced, save upon the recommendation of the Governor-General (see p. 131). The Assembly has no power to interfere with grants appropriated to the service of the public debt, the salary of the Secretary of State for India, or expenditure classified by the Governor-General in Council as ecclesiastical, political, or for defence. Further, the Governor-General in cases of emergency has power to authorise such expenditure as may in his opinion be necessary for the safety or tranquillity of British India or any part thereof. Notwithstanding that any bill has not been passed by the other Chamber the Governor-General may certify that the bill is essential for the safety or tranquillity of interests of British India and forward the bill for the assent of His Majesty; or the Governor-General, if a state of emergency exists such as requires it, may declare the Act in operation forthwith, subject to disallowance by His Majesty in Council. Under section 68 of the Government of India Act, 1915, the Governor-General may assent to an Act of the Indian Legislature, withhold his assent or reserve the Act for the signification of His Majesty's assent, and even if the Governor-General assents the Crown through the Secretary of State may subsequently disallow the Act. Without leave of the Governor-General it is unlawful to introduce to any meeting of the Council any measure affecting the public debt of India, the religious rites or usages of any class in India, the

discipline of the army or navy, or the relations of the Indian Government with foreign princes or states. The Government of India therefore still includes the features irreconcilable with notions of popular government which have been aptly described as "an irremovable executive and an irresponsible Legislature" (a).

**The Provincial Legislatures.**—British India for purposes of provincial legislation is divided into nine major provinces, Bengal, Madras, Bombay, Bihar and Orissa, United Provinces, Punjab, Burma, Assam, and Central Provinces. The Legislature of India is given exclusive administration over certain subjects which include defence of India and external relations, railways, shipping and navigation, posts and telegraphs, customs, income tax, salt and opium, the public debt, currency and coinage, civil and criminal law, commerce and banking and a number of minor activities which cannot be dealt with efficiently by the Provincial Legislatures. All other subjects are delegated to the Provincial Legislatures. The preamble to the Act of 1919 recites : "and whereas concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those provinces in provincial matters the largest measure of independence of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities." Consequently there is an intention in the development of self-government in India to extend the functions of the Provincial Legislatures in the future both as regards the powers now exclusively exercised by the Central Legislature, which may be delegated to them, and also with regard to the transfer of subjects at present exclusively reserved to the Governors and their Executive Councils.

**The Governors and Lieutenant-Governors.**—Madras and Bombay being originally independent presidencies, formerly had the exclusive privilege of being administered by a Governor, who was usually a person of rank and experience in England, appointed by the Crown on the advice of the Secretary of State

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(a) See article, "The New Constitution of India," by the Right Hon. Lord Meston, *Journal of Comparative Legislation*, 3rd ser., vol. v, 1923, p. 1.

for India, whereas the Crown in the other provinces was represented by a Lieutenant-Governor, who was an official of at least ten years' service in India, appointed by the Governor-General, subject to the approval of the Secretary of State in Council. Under section 46 of the Government of India Act, 1915, and section 3, sub-section 2 of the Act of 1919, the provinces other than the Presidencies of Bengal, Bombay and Madras are likewise represented by a Governor appointed under the Sign Manual after consultation with the Governor-General.

**Reserved and Transferred Subjects.**—As already stated, the public business of each province is divided into two classes, the reserved subjects which are within the exclusive province of the departments administered by the members of the Executive Council, and the transferred subjects which are within the scope of the Governor acting with ministers. The reserved subjects include the administration of justice, police, and prisons; the administration of the land laws, and land revenue system; irrigation and famine relief; forests, except in Bombay; provincial loans, and some minor matters of public administration. The transferred subjects include education, public health and hygiene, local self-government, public works, excise, agriculture, industries and the minor departments of administration not specifically reserved.

**The Governors' Executive Councils.**—The members of a Governors' Executive Council number not more than four, of whom one, at least, must have had twelve years' service in India. They are appointed by the Governor-General, to whom they are ultimately responsible for the discharge of their duties.

**The Governors' Ministers.**—Section 4 of the Government of India Act, 1919, provides that a Governor may appoint ministers other than members of his Executive Council to administer transferred subjects and who hold office during his pleasure. They are to be chosen from the Legislative Council and presumably the Governor is to appoint as ministers to advise him on the transferred subjects members who command a majority of votes in respect to measures introduced by them belonging to the category of transferred subjects. A minister receives the

same salary as is payable to a member of the Executive Council, and consequently it is intended that in respect of the transferred subjects the Legislative Council will have a measure of control analogous to responsible government. In respect of the reserved subjects the Legislative Council has no control and the Executive Council remains responsible alone to the Governor-General, and ultimately, through the Secretary of State, to Parliament. The Instructions issued by the Crown to each Governor state that he is as far as is possible to keep the respective classes of reserved and transferred subjects distinct, and that he is to encourage the joint deliberation of the Executive Council and the Ministers, "in order that the experience of your official advisers may be at the disposal of your Ministers and that the knowledge of your Ministers as to the wishes of the people may be at the disposal of your Councillors." To prevent conflict between the two Councils in matters which concern them both the Governor is expected to convene joint meetings of his whole Government, and in case of doubt, to decide himself within which half of his Government activities the controversial subject comes. But whatever action is taken all orders must be authenticated as coming either from one or the other half of the Government (section 6). Section 41 of the Act of 1919 provided for the appointment of a Statutory Commission at the end of ten years from the passing of the Act to inquire into the growth of education and the development of representative government in India under the working of the Act and how far the principle of representative government may be extended in India. Presumably the Commission represented by Sir John Simon will report upon whether there should be a re-transfer of transferred subjects to the reserved category or whether responsible government is to be further extended by enlarging the list of transferred subjects. If the Commissions report in favour of the extension of popular representation, control of the Legislature will ultimately pass completely into the hands of the Governor acting on the advice of responsible ministers.

**The Provincial Legislative Councils.**—The numbers of members of Legislative Councils vary from 118 in Madras to 53 in Assam. Special provision is made in them for the

representation of minority communities and special interests, but otherwise the electoral divisions are territorial and the franchise qualifications low. Not more than twenty per cent. may be official members and at least seventy per cent. must be elected members. The Governor may, for the purposes of any bill introduced into his Legislative Council, appoint two persons (in the case of Assam one person) having special knowledge of the subject-matter of the Bill, and such persons have for the time being all the rights of members. The Legislative Councils continue for three years unless sooner dissolved by the Governor. After the first four years the President of the Legislative Council is to be elected by the Legislative Council. His office is analogous to the Speaker of the House of Commons. The President is assisted by a Deputy President also elected by the Legislative Council and approved by the Governor. Bills relating to both transferred and reserved subjects are submitted to the Legislative Council, who may pass or reject them. If, however, a bill upon a reserved subject is rejected, the Governor may certify that it is essential for his responsibility for the subject and the bill is thereupon deemed to have passed, and may be assented to by His Majesty in Council. The Governor has a similar power to reserve for His Majesty's assent a bill passed by the Legislative Council.

Over the transferred subjects there is, however, an element of popular control. That is to say, the ministers are present in the Legislative Council to defend the measures they have introduced and the Legislative Council may by vote signify their want of confidence in their administration. In the last resort, however, the Governor may veto such resolutions, but the interference of the Governor is subject to the control of the Governor-General and Secretary of State, who will not justify its exercise unless intervention is necessary in Imperial interests or ~~for~~ the duties of the Governor under the Act or to prevent disputes arising between provinces.

## CHAPTER XII.

GOVERNMENT IN THE CROWN COLONIES: CLASSIFICATION OF  
COLONIES ACCORDING TO THEIR DEGREES OF LEGISLA-  
TIVE AUTONOMY.

As has already been pointed out in Chapter I, there is a broad distinction between colonies which possess responsible government subject to the remote possibility of being overruled by Act of the Imperial Parliament, what are called the self-governing dominions, and Crown colonies, the government in which is under the close control of the Secretary of State for the Colonies.

The main differences in the powers and methods of administration of the Governments of Crown colonies and the self-governing dominions are as follows:—

(a) The administration in the Crown colonies is carried out upon the direct instructions from the Imperial Colonial Office to the respective Governors.

(b) The members of the Executive Councils in the Crown colonies are both appointed by, and are removable by, the Colonial Secretary. They are colonial civil servants and are in no sense responsible ministers obliged to carry out the policy of a party or pledged to support the mandates of an electorate.

(c) The Governor, though instructed to act with the advice of his Executive Council, may act in opposition to it, in which case he reports the occurrence to the Home Government.

(d) Even if there is a Legislature in the colony the Governor has over legislation an absolute veto which he not infrequently exercises.

(e) The Governor, where there is a Legislature, may (except in the case of Class (a) colonies, the Bahamas, Barbadoes, and Bermudas; see p. 250) preside and frequently has power to

vote. Such a condition is, naturally, inconsistent with responsible government.

(f) No money bill, tax or appropriation can be introduced in the Legislature except on the recommendation and with the approval of the Governor.

(g) With the exception of the Crown colonies already mentioned as Class (a) and a few others, the Imperial Government has reserved the right of legislating by Order in Council. In the Letters Patent or Order in Council promulgating the Constitution of a Crown colony it is nearly always provided that the Crown reserves the right to alter or revoke the Constitution, and thus the decision in *Campbell v. Hall* (see p. 61) although it remains good law does not apply.

**Constitutional Government in the Crown Colonies.** — The Crown colonies, for purposes of comparison of their Constitutions and degrees of autonomy, are usually divided into five categories :—

(a) Colonies possessing a wholly elective Lower House and a nominated Upper House, generally called the House of Assembly and Legislative Assembly respectively. In this category may be quoted as examples, the Bahamas, Barbadoes, and the Bermudas. The distinctive features of the government of these Crown colonies is that they have :—

1. A House of Assembly which is wholly elective in character and contains no nominated or official members.

2. Unlike most Crown colonies, in the Bahamas, Barbadoes and Bermudas, the Crown has not reserved any power to legislate by Order in Council, but has thus parted completely with the power of its prerogative to legislate in them. Only an Act of the Imperial Parliament can override Acts of their Legislatures.

3. The Government is vested in the Governor and an Executive Committee of five public officials appointed from England on the advice of the Governor, but in all controversial matters the Governor is advised by an Executive Council consisting of the five official members and five representing the Legislature. The unofficial members consist of four members of the Legislative Assembly and one from the Legislative Council. The Executive

Council formed of these ten members is not a ministry and they do not govern, but they initiate all money votes, ~~prepare~~ estimates and draft Government bills. The Governor is present at its deliberations and has a casting vote.

(b) Colonies possessing a single chamber Legislature, generally known as a Legislative Council, which is (1) partly elected, and (2) the Constitution of which does not provide for an official majority. By "official majority" is meant that the Council contains members who hold office under the Crown and are removable at pleasure and are thus bound to vote as directed by the Crown as indicated by the Governor. In colonies coming under this category there may be provision for the inclusion of members nominated to represent particular interests or communities, but these are not official members, and though the Legislative Council may contain official members there are more nominated and elected members than sufficient to out-vote them.

For instance the Constitution of Ceylon as framed in 1920 and amended in 1923, consists of:—

(1) An Executive Council of twelve members, consisting of five *ex-officio* members holding specified offices and seven others appointed by the Imperial Government.

(2) A Legislative Council of forty-nine members, including the twelve official members mentioned above and thirty-seven unofficial members. The thirty-seven unofficial members include twenty-nine members elected on the basis of a territorial franchise and eight nominated to represent various religious communities.

The Governor may at any time if he thinks fit preside over the meetings of the Legislative Council, but at other times a Chairman sits who is elected by the Legislative Council itself.

The Legislative Council has power to amend the Constitution, but the Governor may reserve any bill for the pleasure of His Majesty and the Imperial Government may disallow any Act. His Majesty has reserved express power to pass laws by Order in Council, and thus the Imperial Government may directly legislate for Ceylon and (clause 67) it may amend or even revoke the Constitution.

Clause 54 of the Order in Council of 1920, which contains the Constitution for Ceylon, includes provisions similar to those in

the Government of India Act relating to reserved subjects.. The Order provides : " If the Governor is of opinion that the passing of any Act or any clause of it or any amendment to or any resolution or veto is of paramount importance to the public interest, he may declare such bill, clause, amendment, etc., to be of paramount importance. In any such case only the votes of the *ex-officio* members shall be taken into consideration, and any such bill shall be deemed to have so passed by the legislative council if a majority of votes of such *ex-officio* and nominated official members shall be passed in favour of it." In this way the Governor may certify a bill of paramount importance and override the executive.

Clause 66 provides that the decision of the Governor in Executive Council on any question which may arise as to the intention, construction or application of this Order and of the Rules thereunder shall be final. In other words the Court cannot interpret the Constitution, the meaning of which is left to the arbitrary decision of the Governor.

(c) Colonies possessing a single chamber Legislature which is partly elective but the Constitution of which does provide for an official majority. In this category belong Jamaica, Grenada, Straits Settlements, Mauritius, Nigeria, Leeward Islands, Fiji, St. Lucia, St. Vincent, Kenya, Sierra Leone, Trinidad.

The Constitution of Jamaica, for instance, is contained in an Order in Council of October, 1895, which provides for a Legislative Council, to consist of the Governor, five *ex-officio* or official members, and in addition not more than ten other persons appointed by the Imperial Government. To these are added fourteen elected members, so that the Legislative Council numbers twenty-nine and the Government is always able to command a majority of at least one vote, in addition to which the Governor presides, may speak and vote. The Executive Government is carried on by the Governor and a Privy Council consisting of not more than eight members, who consist of the five *ex-officio* members who sit in the Legislative Council and three others appointed by the Imperial Government on the advice of the Governor.

(d) Colonies and protectorates possessing a single chamber

Legislature which is not elective, but all the members of which are nominated by the Crown. In this category belong the Gold Coast, Uganda, Kenya, Falkland Islands, Honduras, Nyassaland, Northern Rhodesia (see p. 285).

(e) Colonies and protectorates without any Legislative Council. That is to say, the whole legislative power and government of the colony or protectorate is vested in the Governor who is advised by his permanent officials. In this category belong Ashantee, Gibraltar, St. Helena, Wei-hai-wei, and the northern territories of the Gold Coast.



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It is designed as an assistance to the memory of the Student who has read Odgers or Indermaur on the Common Law.

**Contracts—continued.**

**CARTER on Contracts.** Elements of the Law of Contracts. By A. T. CARTER, of the Inner Temple, Barrister-at-Law, Reader to the Council of Legal Education. Sixth Edition. 272 pages. Price 12s. 6d. net. 1925

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(See also Real Property.)

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This book is complementary to and extends the information in Williams, and Deane and Blease's Real Property. It deals with the Acts of 1925. The reader is taken through the component parts of Purchase Deeds, Leases, Mortgage Deeds, Settlements and Wills, and the way in which these instruments are prepared is explained. Previous to this is a short history of Conveyancing, and a chapter on Contracts for Sale of Land dealing with the

### ~~Conveyancing~~—continued.

statutory requisites, the form, particulars and conditions of sale, the abstract of title, requisitions, etc., and finally there is a chapter on conveyance by registration. The second part of the book, covering about 100 pages, contains CLARK'S STUDENTS' PRECEDENTS IN CONVEYANCING, illustrating the various documents referred to in the first part. It is the only book containing a representative collection of precedents for students.

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**ODGERS on the Common Law.** See page 7.

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See page 14.

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**All You Want for the Bar Final.** See page 19.

**COCKLE'S Leading Cases and Statutes on the Law of Evidence**, with Notes, explanatory and connective, presenting a systematic view of the whole subject. By ERNEST COCKLE, Barrister-at-Law. Fourth Edition. By S. L. PHIPSON. 533 pages. Price 18s. 6d. net. 1925

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## ~~Evidence~~—continued.

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This is a practical book for the law student. It is interesting, and is packed full of valuable hints and information. The author lays down clearly and succinctly the rules which should guide the advocate in the examination of witnesses and in the argument of questions of fact and law, and has illustrated the precepts which he has given by showing how they have been put into actual practice by the greatest advocates of modern times.

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This book tells you what are the best books to read, how and when to read them, gives test questions to be answered at the various stages of reading and a set of questions and answers. Even if you are being coached, you will find many useful hints and much sound advice in it.

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(See also Conflict of Laws.)

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